APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1447

SCHUYLKILL ENERGY RESOURCES, INC.,
Appellant,

v.

PENNSYLVANIA POWER & LIGHT COMPANY,
Appellee.

Argued February 6, 1997
Decided May 5, 1997

Sur Petition for Rehearing June 2, 1997

COUNSEL: Richard L. Caplan, Esquire, Mary Huwaldt, Esquire (ARGUED), Michelle L. Davis, Esquire, Caplan & Luber, 40 Darby Road, Paoli, Pennsylvania 19301, COUNSEL FOR APPELLANT.

Glen R. Stuart, Esquire (ARGUED), David B. MacGregor, Esquire, Morgan, Lewis & Bockius, LLP, 2000 One Logan Square, Philadelphia, Pennsylvania 19103, Stephen Paul Mahinka, Esquire, Elizabeth A. Powell, Esquire, Morgan, Lewis & Bockius, LLP, 1800 M Street, N.W., Washington, D.C.

20036-5869, OF COUNSEL: Jesse A.Dillon, Esquire, Pennsylvania Power & Light, Company, Two North Ninth Street, Allentown, Pennsylvania 18101, COUNSEL FOR APPELLEE.

Before: STAPLETON and MANSMANN, Circuit Judges, and RESTANI, Judge, Court of International Trade.*

MANSMANN, Circuit Judge.

Schuylkill Energy Resources, Inc., ("SER") filed this antitrust action against Pennsylvania Power & Light Co. ("PP&L") for allegedly monopolizing and attempting to monopolize the provision of electric energy to retail consumers within PP&L's service area and to wholesale resellers affiliated with PP&L. SER contends that PP&L impermissibly curtailed purchases of SER-generated electric energy and that SER was therefore unable to compete with PP&L in the provision of electric energy to consumers in the retail market and resellers in the wholesale market.

The district court granted PP&L's motion to dismiss SER's antitrust claims for failure to state a claim upon which relief can be granted and declined to exercise supplemental jurisdiction over SER's pendent state law claims. We must decide whether SER has adequately pled antitrust injury. We find that by agreement and by law, SER is PP&L's supplier, not PP&L's competitor, and that PP&L's generation curtailment policy does not create an injury of the type the antitrust laws were intended to prevent. We will affirm.

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

I.

Under the Federal Power Act, 16 U.S.C. § 791a *et seq.*, any person who owns or operates facilities used to transmit or sell electric energy in interstate commerce is subject to the jurisdiction and regulatory power of the Federal Energy Regulatory Commission ("FERC"). 16 U.S.C. § 824. In 1978, Congress amended the Federal Power Act by passing the Public Utility Regulatory Practices Act of 1978 ("PURPA"). Congress passed PURPA to encourage the development of alternative energy sources in an effort to reduce United States' dependence on foreign oil. Congress believed that the development of alternative energy sources was impeded by the reluctance of traditional electric utilities to purchase energy from and sell energy to non-traditional facilities as well as by the substantial financial burdens imposed on non-traditional facilities by pervasive federal and state regulation. *See FERC v. Mississippi*, 456 U.S. 742, 750-51, 102 S. Ct. 2126, 2132-33, 72 L. Ed. 2d 532 (1982) (citing legislative history of PURPA).

To further this goal, PURPA requires electric utilities to purchase electric energy produced by independent power producers operating so-called "qualifying cogeneration facilities." *See* 16 U.S.C. §§ 796(18)(B), 824a-3. Congress directed FERC to promulgate rules and regulations governing the terms of such purchases and sales, and state agencies such as the Pennsylvania Public Utility Commission ("PUC") are empowered to regulate the facilities and approve the contracts

covered by PURPA. *See* 16 U.S.C. § 824a-3(f); 18 C.F.R. pt. 292.[1]

II.[2]

SER is an independent power producer that owns and operates an anthracite coal refuse-fired cogeneration plant in Shenandoah, Pennsylvania. The plant is a qualifying facility under PURPA, the Federal Power Act, and PUC regulations. *See* 16 U.S.C. § 796(18); 18 C.F.R. pt. 292; 52 Pa. Code § 57.31.[3]

PP&L is an electric utility chiefly reliant on coal-burning and nuclear power sources. PP&L services Allentown, Pennsylvania, and surrounding areas. PP&L is regulated by the PUC. PP&L is a member of the Pennsylvania-New

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[1] The PUC is an independent state administrative commission authorized to regulate public utility companies doing business in Pennsylvania. *See* 66 Pa. Cons. Stat. Ann. §§ 301, 501. The Pennsylvania Public Utility Code provides the PUC with broad authority to "supervise and regulate" public utilities doing business in Pennsylvania. *Id.* § 501(b). PUC regulations, like their FERC counterpart, require utilities to purchase energy from "qualifying facilities." 52 Pa. Code § 57.34.

[2] When reviewing a Rule 12(b)(6) dismissal for failure to state a claim upon which relief can be granted, we must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn from them. *Fuentes v. South Hills Cardiology*, 946 F.2d 196, 201 (3d Cir. 1991).

[3] SER asserts that it is both an independent power producer and a qualifying facility. We note, however, that an "independent power producer" is by definition "an electric power supplier which is not a qualifying facility . . . ." 52 Pa. Code § 57.31. This potential conflict is not relevant for the purposes of this appeal, however, and throughout this opinion we will refer to SER as both an independent power producer and a qualifying facility without deciding whether either designation is inappropriate.

Jersey-Maryland Interconnection ("PJM"), a power pool maintained by an unincorporated association of approximately eight member electric utilities located in Pennsylvania, New Jersey, Maryland, Delaware and Washington, D.C. PJM member companies sell excess electric generation capacity to PJM, which is then sold to other PJM member companies or to other power pools.

Pursuant to the regulations promulgated by FERC under the authority of PURPA, PP&L is required to purchase electric energy from SER.[4] On October 17, 1986, SER and PP&L entered into a twenty-year Power Purchasing Agreement. Under the terms of the Agreement, "SER is required to sell exclusively to PP&L, and PP&L is required to purchase SER's entire net power output up to 79.5 megawatts at a price per kilowatt hour which is either fixed within the agreement or calculated as a percentage of PP&L's Energy-Only Avoided Cost." Amended Complaint, ¶ 22. PP&L is permitted to purchase less than SER's total electric energy output "only when curtailed purchases are necessary for PP&L 'to make repairs, changes, tests or inspections, or for reasons of an actual or potential System Emergency, Forced Outage, Force Majeure or PP&L System operating condition which necessitates such disconnections or curtailments . . . .' " Amended Complaint, ¶ 31 (quoting Agreement, Art. 9, ¶ E). PP&L may not curtail purchases of SER's electric output " 'for reasons of economic dispatch.' " Amended Complaint, ¶ 42 (quoting Agreement, Art. 9, ¶ E).

The Agreement defines "system emergency" as "any condition on the PP&L System or PJM System which, in PP&L's opinion, may disrupt service to customers or

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[4] PP&L is also required to (and does) purchase electric energy from independent power producers other than SER.

endanger life or property." Amended Complaint, ¶ 32 (quoting Agreement, Art. 1, ¶ CC). According to SER, PP&L has improperly construed the term "system emergency" to include "minimum generation emergencies" and "minimum generation events" (collectively "MINGENS") identified by PJM. MINGENS occur when the aggregate power demand within the regions serviced by PJM is expected to fall below its normal or emergency minimum generation floor level and PJM cannot sell the pool's excess power to the other pools or reduce PJM member company purchases.

SER alleges that when MINGENS are issued by PJM, PP&L has a policy of reducing purchases of energy from independent power producers with high energy prices first and cutting purchases from PP&L-owned energy producers less severely. SER alleges that the majority of PP&L's declarations of system emergencies are disingenuous and are actually declared for reasons of "economic dispatch." In other words, when total electric power available for distribution by PJM exceeds aggregate customer demand, PP&L disproportionately curtails the purchase of electric energy generated by SER and other independent power producers.

SER complains that when PP&L curtails purchases of energy from SER (as it has on several occasions), SER is unable to satisfy its own parasitic load requirements and must purchase oil and electricity. SEC also alleges that PP&L's generation curtailments have caused it to lose revenues and to incur other incidental costs.

III.

In its Amended Complaint, SER alleges two separate federal antitrust violations by PP&L under Section 2 of the Sherman Act, 15 U.S.C. § 2. In Count I, SER alleges a claim of monopolization. In Count II, SER alleges a claim of

attempt to monopolize. SER also alleges related state-law claims for intentional misrepresentation, negligent misrepresentation, breach of contract, and breach of duty of good faith and fair dealing.

On November 2, 1995, PP&L moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the Amended Complaint in its entirety. In the alternative, PP&L sought to have the district court stay the federal proceeding and refer the case on primary jurisdiction grounds to the PUC for an administrative proceeding to determine the regulatory propriety of PP&L's generation curtailment policies. On January 23, 1996, the district court invoked the doctrine of primary jurisdiction, entered a stay order suspending all further proceedings pending the outcome of the anticipated PUC proceeding, and denied without prejudice PP&L's motion to dismiss the Amended Complaint.

On February 2, 1996, SER filed a motion for reconsideration of the stay order. On April 15, 1996, the district court heard oral argument on both SER's motion for reconsideration and the merits of PP&L's motion to dismiss the Amended Complaint. The court directed the parties to file letter briefs on these motions. In its April 19, 1996, letter brief, SER included two footnotes in which it requested an opportunity to amend its Amended Complaint in lieu of dismissal. SER never filed a formal motion to amend its Amended Complaint.

On May 21, 1996, the district court granted PP&L's motion to dismiss SER's Amended Complaint in its entirety. After dismissing SER's federal antitrust claims, the district court declined to exercise supplemental jurisdiction over SER's state law claims pursuant to 28 U.S.C. § 1367(c)(3). The court dismissed as moot SER's motion to lift the stay

order. SER filed this timely appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.[5]

IV.

Section 2 of the Sherman Act provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2. To state a claim for monopolization, a plaintiff must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 197 (3d Cir. 1992) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)). To state a claim for attempted monopolization, a plaintiff must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 113 S. Ct. 884, 890-91, 122 L. Ed. 2d 247 (1993); *see also Barr Lab., Inc. v. Abbott Lab.*, 978 F.2d 98, 112 (3d Cir. 1992) (plaintiff must allege that defendant "(1) had specific intent to monopolize the relevant market, (2) engaged in

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[5] We exercise plenary review over the district court's grant of PP&L's Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 277 (3d Cir. 1996). We apply the same standard as the district court; that is, we must "refrain from granting a dismissal unless it is certain that no relief can be granted under any set of facts which could be proved." *Fuentes*, 946 F.2d at 201.

anti-competitive or exclusionary conduct, and (3) possessed sufficient market power to come dangerously close to success.").

SER's right to maintain a private cause of action for damages arising under Section 2 of the Sherman Act flows from Section 4 of the Clayton Act, which provides for suits by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a). In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977), the Supreme Court limited the class of Section 4 plaintiffs to those who plead and prove "antitrust injury." Observing that the antitrust laws were designed for the "protection of competition, not competitors," the Court stated:

> Plaintiffs . . . must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 489, 97 S. Ct. at 697 (emphasis in original); *see also Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 875 (3d Cir. 1995); *International Raw Materials, Ltd. v. Stauffer Chem. Co.*, 978 F.2d 1318, 1327-28 (3d Cir. 1992).

SER alleges that PP&L's curtailment of energy purchases from SER and other independent power producers harms competition and consumer welfare

> by keeping PP&L's rate base artificially high, by depriving consumers within PP&L's service area of energy sources other than those owned and/or

> exploited by PP&L (which, in turn, reduces the reliability of electric service provided), and by reducing the availability to consumers of power produced using alternative, environmentally pro-active energy sources.

Amended Complaint, ¶ 66.[6] We address each of these alleged injuries in turn.

We begin with SER's allegation that PP&L's generation curtailment policy enables PP&L to keep its rate base artificially high. SER contends that PP&L's rate base is a function of the value of "used and useful" capital equipment owned by PP&L for generating, transmitting and distributing electricity to the public. PP&L may not, however, include the cost of electrical power purchased from independent power producers like SER in PP&L's rate base.[7] According to SER, during periods of lower demand, PP&L has an economic incentive to maintain power generation at its own facilities (to preserve a high rate base) and to reduce energy purchases

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[6] SER also alleged a list of its damages, including the loss of electricity sales revenues, increased costs to purchase fuel oil and electricity, and accelerated depreciation of the plant through increased stress upon vital components attributable to excessive cycling. Amended Complaint, ¶ 70. These allegations do not constitute antitrust injury. As the district court properly concluded, "such injuries to an individual competitor company, without allegations of injury to competition or consumer welfare, are insufficient as a matter of law to establish a violation of federal antitrust law." Dist. Ct. Op., at 7, 1996 WL 284994, at *3 (E.D. Pa. May 21, 1996); *see Brunswick*, 429 U.S. at 488, 97 S. Ct. at 697.

[7] "Utilities earn a return only on their property which is used and useful in producing and delivering power. The utilities earn no return on costs, such as those incurred to purchase fuel or power from other sources such as [qualifying facilities]." *Lehigh Valley Power Comm. v. Pennsylvania Pub. Util. Comm'n*, 128 Pa. Commw. 259, 563 A.2d 548, 552 n.10 (Pa. Commw. Ct. 1989).

from independent power producers, which cost PP&L money but contribute nothing to PP&L's rate base.

Under the circumstances of this case, whether and to what extent PP&L maintains an artificially high rate base is not within the purview of the antitrust laws. As SER concedes, Pennsylvania regulators -- not the market -- determine PP&L's rate base. PP&L has no unilateral ability to change its rates; any increase or decrease in rates must be filed with the PUC and conform to PUC regulations and orders. See 66 Pa. Cons. Stat. Ann. # 8E8E # 1301, 1308; *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1270 (3d Cir. 1994) ("Pennsylvania statutes expressly provide for PUC regulation of rates . . . .").

PP&L contends that "the antitrust laws are intended to protect the competitive process by which prices and other terms of trade are established by the marketplace, not how regulators administer the accounting formulas that [are used in] ratemaking." Appellee Brief, at 20. We agree. SER's complaints about PP&L's allegedly high rate base should be brought before the PUC, not to federal court on an antitrust complaint.[8]

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[8] In Pennsylvania, the PUC has been entrusted with "full power and authority . . . to enforce, execute and carry out, by its regulations, orders, or otherwise, . . . the provisions of [the Code] and the full intent thereof." 66 Pa. Cons. Stat. Ann. § 501; *see id.* § 1301 (rates shall be "just and reasonable").

SER's assertion that PP&L's curtailments allow it to "unfairly and illegally skew the evidence, concerning the extent to which its capital equipment is utilized that it presents the PUC in support of rate requests, thereby misleading the PUC in its rate determinations," Appellant Brief, at 18-19, might also appropriately be grounds for a complaint before the PUC, but it is not a basis for an antitrust complaint. *See* 66 Pa. Cons. Stat. Ann. § 1311 (PUC may ascertain and fix fair value of public utility's property); *id.* §§ 505, 1302 (public utilities shall furnish information to PUC) .

SER also alleges that PP&L's curtailment of energy purchases from SER and other independent power producers "deprives consumers within PP&L's service area of energy sources other than those owned and/or exploited by PP&L." Amended Complaint, ¶ 66. Depriving consumers of "energy sources" is not, however, cognizable antitrust injury. An "energy source" is not the same as a "competitor," and the fact that PP&L obtains the majority of its energy from few energy sources does not indicate an absence of competition. For example, if PP&L were to "own and/or exploit" a diverse supply of energy sources, thus satisfying SER's expressed concern, the relevant question of whether PP&L was unlawfully monopolizing the relevant market would remain unanswered. Consumers within PP&L's service area would still receive the same product (electricity) and the same amount of competition (none). At issue is whether PP&L unlawfully excluded independent power producers like SER from the relevant market, not whether consumers receive electricity generated by nuclear, coal, culm, solar, or any other energy source.[9]

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[9] In addition, while the environmental quality of energy sources may be a worthwhile concern, it does not appear to be a problem whose solution is found in the Sherman Act. *See, e.g., In re Multidistrict Vehicle Air Pollution*, 538 F.2d 231, 236 (9th Cir. 1976) (where "the harm to be alleviated is environmental, not economic in the antitrust sense," court affirmed dismissal of antitrust suit); *Conservation Council of W. Austl., Inc. v. Aluminum Co. of Am.*, 518 F. Supp. 270, 281 (W.D. Pa. 1981) (where plaintiff "attempts to raise environmental issues under the guise of antitrust laws," court dismissed plaintiff 's complaint for failure to state claim upon which relief can be granted); *see also Gutierrez v. E. & J. Gallo Winery Co., Inc.*, 604 F.2d 645, 646 (9th Cir. 1979) (affirming dismissal of antitrust claims brought by farm workers complaining about work reduction; plaintiffs' goals were unrelated to purpose of antitrust laws); *Marchwinski v. Oliver Tyrone Corp.*, 83 F.R.D. 606 (W.D. Pa. 1979) (dismissing antitrust claims that sought to remedy gender

Even if we construe SER's Amended Complaint to find an assertion that PP&L's generation curtailment policy destroys competition in the provision of energy to consumers, we would still not find any cognizable antitrust claim in this case. To state a claim for monopolization, SER must allege, inter alia, that PP&L willfully acquired or maintained monopoly power in the relevant market. To state a claim for attempted monopolization, SER must allege, inter alia, that PP&L had a dangerous probability of achieving monopoly power in the relevant market. For both claims, we must consider the scope of the relevant market. *Spectrum Sports*, 506 U.S. at 456-59, 113 S. Ct. at 891-92. According to SER, the primary relevant market in this case is the retail service of 1.2 million customers in PP&L's service area, which covers approximately 10,000 square miles of central eastern Pennsylvania. Amended Complaint, ¶ 16.

Thus, SER must allege that PP&L unlawfully acquired monopoly power or had a dangerous probability of unlawfully achieving monopoly power in its service area. To do this, SER must allege that PP&L in some way acted to exclude SER as a competitor in the delivery of electricity to customers in PP&L's service area. In *Vinci v. Waste Management, Inc.*,

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discrimination); *cf. National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 693-95, 98 S. Ct. 1355, 1366-67, 55 L. Ed. 2d 637 (1978) (rejecting defendant's attempt to use safety and health to justify anticompetitive behavior).

We do not decide that environmental quality can never be considered when conducting antitrust analysis. Rather, we conclude that when an antitrust defendant's conduct cannot be linked to antitrust injury, the fact that the conduct may be otherwise undesirable is not a concern of the antitrust laws.

80 F.3d 1372 (9th Cir. 1996), the Court of Appeals for the Ninth Circuit explained:

> The antitrust laws are intended to preserve competition for the benefit of consumers in the market in which competition occurs. . . . The requirement that the alleged injury be related to anti-competitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors. . . . A plaintiff who is neither a competitor nor a consumer in the relevant market does not suffer antitrust injury.

Id. at 1376 (internal quotations and citations omitted); *see also International Raw Materials*, 978 F.2d at 1328. SER attempts to satisfy its pleading obligation by contending that it is PP&L's competitor in the retail market:

> PP&L gets reimbursed dollar for dollar from its customers . . . for all power which it purchases from SER . . . . Therefore, SER, to all intents and purposes, is selling its power to the public with PP&L acting as a distribution agent or middleman. . . . SER, therefore, is a competitor with PP&L for the sale of electric energy to PP&L's consumers within PP&L's service area.

Amended Complaint, ¶¶ 24-25. According to SER, PP&L's generation curtailment policy harms SER, and thus harms competition. We do not agree. SER is not PP&L's competitor -- it is PP&L's supplier. SER concedes that in October 1986, it entered into an agreement with PP&L in which "SER is required to sell [its electric energy] exclusively to PP&L" for twenty years. Amended Complaint, ¶¶ 20, 22. Pursuant to the Agreement which SER now seeks to enforce, SER is currently prohibited from competing with PP&L in the relevant market.

A supplier of a product does not become a competitor of the purchaser merely because the purchaser in turn sells the product to the ultimate user. SER cannot allege that PP&L's purported breach of contract establishes injury to competition when that very contract prevents SER from competing with PP&L in the first place.

In addition to the fact that the Agreement on its face defeats SER's claim that it is PP&L's competitor, state and federal laws prohibit SER from competing in the relevant market. SER concedes that independent power producers such as SER "normally cannot, by virtue of state and federal regulation and physical limitations, sell power directly to consumers." Amended Complaint, ¶ 12. SER does not allege that it is currently permitted to sell electricity directly to consumers, and SER concedes that "SER did not, at the time the complaint was drafted, have the ability to deliver environmentally friendly energy directly to retail consumers." Oral Arg. Trans. at 5.[10]

SER directs our attention to the Pennsylvania Electricity Generation Customer Choice and Competition Act, 66 Pa. Cons. Stat. Ann. § 2801 *et seq.*, which was signed into law on December 3, 1996. The Choice and Competition Act will fundamentally restructure Pennsylvania's retail electric industry by providing consumers with a choice of electric generation suppliers. The Act will permit competition in PP&L's service area.

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[10] *See also Greensboro Lumber Co. v. Georgia Power Co.*, 643 F. Supp. 1345, 1373 (N.D. Ga. 1986) ("In establishing PURPA, . . . Congress did not intend to place qualifying facilities in competition with public utilities. . . . Qualifying facilities are not authorized under PURPA to sell at retail . . . . They are not competitors of public utilities."), *aff'd*, 844 F.2d 1538 (11th Cir. 1988).

The Choice and Competition Act comes too late for SER's Amended Complaint. Competitive retail access will be phased in over time, and direct access to competition will not exist across Pennsylvania until January 1, 2001. Competitive retail access pilot programs did not begin until April 1, 1997, *id.* § 2804(12), long after SER filed its Amended Complaint, and the pilot programs are only available to five percent of the "peak load." *Id.* § 2806(B).[11]

SER asks us to find that PP&L's generation curtailment policy injures SER today, and that those injuries will inhibit SER's ability to compete with PP&L in the future market. We cannot permit SER to pursue such a speculative path to recovery under the Sherman Act.

We will not attempt to predict the future of competitive retail access in Pennsylvania. We do not know whether SER or PP&L will even exist in 2001, and we certainly do not know whether PP&L will enjoy an unlawful monopoly in its service area at that time.[12] What we do know is that SER is presently unable to compete with PP&L, both by agreement and by law. While SER attempts to characterize itself as PP&L's competitor on the eve of deregulation, we conclude that SER cannot, as a matter of law, establish that PP&L's

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[11] At oral argument, counsel for SER conceded that "the first opportunity for customers to choose their electric generation suppliers is April 1st of this year . . . ." Oral Arg. Trans. at 13.

[12] At oral argument, counsel for SER conceded that "it's true that we don't know exactly what the market will look like[following deregulation] . . . ." Oral Arg. Trans. at 16.

generation curtailment policy creates an injury of the type the antitrust laws were intended to prevent.[13]

As noted, we read SER's Amended Complaint to address primarily SER's intention to compete with PP&L in the retail market -- the 1.2 million customers within PP&L's service area. SER also contends, however, that it is PP&L's competitor for the wholesale distribution of power to PJM member companies and other power pools. Amended Complaint, ¶ 37.[14] According to the Amended Complaint, however, the Power Purchase Agreement requires SER to sell its energy exclusively to PP&L. SER is therefore contractually prohibited from selling energy to wholesale resellers other than PP&L. We cannot conceive how SER intends to compete with PP&L in the wholesale market without violating the very agreement which it seeks to enforce here.[15]

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[13] We do not decide whether PP&L's generation curtailment policy would violate the Sherman Act in a competitive market where no agreement precluded competitive activity. That scenario, while it may arise at some point in the future, is not presently before us.

[14] At oral argument, counsel for SER suggested that the relevant "wholesale market" includes sales to industrial consumers who attach transmission lines to SER's line. Oral Arg. Trans. at 25. We disagree. The "sale of electric energy at wholesale" is defined by statute as the "sale of electric energy to any person for resale." 16 U.S.C. § 824(d) (emphasis supplied). Industrial consumers who purchase electric energy for their own use (i.e., not for resale), are not wholesale customers; they are retail consumers. The relevant wholesale market in this case, as suggested in SER's Amended Complaint, is the sale of energy to PJM member companies and other power pools.

[15] While the Amended Complaint clearly states that SER must sell its energy exclusively to PP&L, the Power Purchase Agreement itself is ambiguous and can be read to permit SER to sell energy to third parties once it provides 79.5 megawatts to PP&L. Agreement, Art. 3. We rely on

In addition, SER's failure to obtain FERC approval precludes it from compelling other PJM member companies to accept energy directly from SER in the wholesale market as a matter of law. Before PJM member companies may be compelled to accept energy directly from SER: (1) SER must file an application with FERC; (2) affected State commissions and utilities must receive notice; (3) there must be an opportunity for a hearing; and (4) FERC must find that such action is necessary or appropriate in the public interest. 16 U.S.C. § 824a(b); 18 C.F.R. pt. 32. In addition, FERC may not compel the enlargement of generating facilities for such purposes, and it may not compel a public utility to sell or exchange energy when to do so would impair the utility's ability to render adequate service to its customers. 16 U.S.C. § 824a(b). SER does not allege that it has applied to FERC or that the other requirements of section 824a(b) have been satisfied.

SER does not allege that it has the ability or desire to sell energy directly to PJM member companies other than PP&L. SER does not even allege that it has taken any steps to secure voluntary interconnection with PJM member companies other than PP&L. *See id.* § 824a(a); 18 C.F.R. § 32.1(g). Indeed,

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the plain language of the Amended Complaint in concluding that the Agreement precludes SER from competing with PP&L in the wholesale market. As we note in the text, however, even if the Agreement does not prevent SER from selling excess energy in the wholesale market: (1) SER may not compel other PJM member companies to accept energy directly from SER due to its failure to comply with 16 U.S.C. § 824a(b); and (2) as a matter of undisputed fact, SER must supply its energy exclusively to PP&L, cannot physically provide energy directly to other utilities, and has not attempted to secure voluntary interconnections with PJM member companies other than PP&L. We will not permit SER to amend its Amended Complaint to clarify its rights under the Agreement as such amendment would be futile.

as Judge Stapleton observes, "SER has not alleged that it has sold, attempted to sell, or even intends to sell any excess capacity" to others in the wholesale market. Rather, SER contends that it competes with PP&L in the wholesale market by selling excess energy to PP&L and having PP&L resell the energy to other utilities. See Amended Complaint, ¶¶ 23, 37. As our rejection of SER's identical retail market argument makes clear, however, an arrangement whereby SER sells energy to PP&L and PP&L resells the energy to third parties (retail or wholesale) makes SER PP&L's supplier, not PP&L's competitor.

In effect, SER's argument turns on itself. In an effort to demonstrate the existence of potential competition in the wholesale market, SER argues that it is not required to sell its excess energy to PP&L. SER also argues, however, that it competes with PP&L in the wholesale market by selling its excess energy to PP&L and hoping that PP&L resells that energy to other utilities. SER cannot have it both ways. If SER is not required to sell its excess energy to PP&L, SER cannot complain that PP&L's failure to purchase that energy constitutes an antitrust violation.

When reviewing a Rule 12(b)(6) dismissal, we must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn from them. *Fuentes*, 946 F.2d at 201. We are not, however, required to accept as true unsupported conclusions and unwarranted inferences. *Vioanti v. Emery Worldwide A-CF Co.*, 847 F. Supp. 1251, 1254-55 (M.D. Pa. 1994); *Resolution Trust Corp. v. Farmer*, 823 F. Supp. 302, 305 (E.D. Pa. 1993); *Sinchak v. Parente*, 262 F. Supp. 79, 81 (W.D. Pa. 1966). While SER alleges in its Amended Complaint that it is PP&L's competitor in the retail and wholesale markets, those assertions are belied by both the remaining factual allegations and the law.

Finally, SER contends that PP&L's curtailment practice reduces the "availability to consumers of power produced using alternative, environmentally pro-active energy sources." Amended Complaint, ¶ 66. As discussed above, however, this allegation does not implicate the antitrust laws. If PP&L did hold an unlawful monopoly in its service area but it decided to generate power with "environmentally pro-active energy sources," PP&L would satisfy SER's alleged concerns, but it would still hold an unlawful monopoly. Likewise, since we conclude that PP&L does not hold an unlawful monopoly in its service area, the fact that PP&L allegedly does not rely on "environmentally pro-active energy sources" does not change our conclusion about PP&L's generation curtailment policy.

We recognize that the existence of antitrust injury is not typically resolved through motions to dismiss. *Brader*, 64 F.3d at 876. This is not, however, a typical case. The fundamental dispute between SER and PP&L concerns the interpretation of the Power Purchasing Agreement. This dispute should be resolved pursuant to common-law contract principles and with reference to PURPA. *Cf. Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194, 1208 (W.D.N.Y. 1995); *id.* at 1203-04 ("Although actions that violate PURPA could conceivably violate the antitrust laws as well, they are not the

same thing, and one does not necessarily flow from the other.").[16] Since both law and contract prevent SER from competing with PP&L, PP&L's generation curtailment policy cannot be said to harm competition. SER has failed to allege any injuries of the type the antitrust laws were designed to prevent, and the district court properly dismissed Counts I and II of the Amended Complaint. Given our disposition of SER's federal antitrust claims, we will also affirm the decision of the district court to decline to exercise supplemental jurisdiction over SER's state law claims.

V.

SER also contends that the district court abused its discretion by not affording SER an opportunity to amend further its Amended Complaint. As noted above, on April 15, 1996, the district court heard oral argument on both SER's motion for reconsideration of the court's stay order and the merits of PP&L's motion to dismiss the complaint. The court directed the parties to file letter briefs on these motions.

In its April 19, 1996, letter brief, SER included two footnotes that suggested its desire to amend the Amended Complaint. SER never filed a formal motion to amend further its Amended Complaint. *See* Fed. R. Civ. P. 15(a). Nonetheless, SER contends that its failure to file a motion for leave to amend should be excused and that it should be

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[16] *Kamine/Besicorp* involved allegations that a public utility used its monopsony power as the exclusive buyer of wholesale electric power within the utility's service area to drive a qualifying facility out of business by demanding a predatory price. 908 F. Supp. at 1203. The district court determined that the utility's monopsony power did not pose a threat to increased consumer prices and that the qualifying facility's demand for payments in excess of the utility's avoided cost was not supported by the antitrust laws. *Id.* at 1203-05.

permitted to amend its Amended Complaint. *District Council 47, Am. Fed'n of State, County & Mun. Employees, AFL-CIO v. Bradley*, 795 F.2d 310, 316 (3d Cir. 1986) (amendment is not precluded merely because plaintiff elects to appeal Rule 12(b)(6) dismissal based on lack of factual specificity rather than seek leave to amend complaint).[17]

Unfortunately, on appeal SER does not indicate what it would do with a second opportunity to amend its Complaint. We look, therefore, to SER's letter brief. Footnote 1 of the brief provides:

> 1. SER believes that all of these inferences [regarding present competition with PP&L in the sale of power to resellers such as municipal utilities, and future competition in a deregulated retail market] are implicit in the language of its Complaint, as well as the suggestion that PP&L's predatory conduct will have a chilling effect upon the future entry into the relevant market of potential new electricity generation competitors to PP&L. Should the court decide that these assertions or others discussed in this letter must be expressly pled, SER asks the court to consider this letter as a request to amend the Complaint appropriately.

SER Letter Brief, at 2 n.1 (April 19, 1996). Footnote 2 states:

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[17] SER's assertion that the stay prevented SER from filing a motion for leave to amend the Amended Complaint is belied by the fact that (1) almost three months elapsed between the time PP&L filed its motion to dismiss and the time the court entered its stay order; (2) SER filed several letter briefs with the court during the stay; and (3) SER did not seek leave from the stay for permission to file a motion for leave to amend. Thus, we will focus on whether we should excuse SER's failure to seek leave to amend its Amended Complaint.

> 2. While this fact issue could be resolved through discovery, SER now seeks leave to amend the Complaint to recite the Plant's actual capacity to generate at least 5.5 megawatts, for potential sale to third parties, in excess of the amount which it presently provides by contract to PP&L.

Id. at 6 n.2. Thus, SER's letter brief suggests a desire to amend its Amended Complaint to detail allegations regarding (1) SER's present ability to compete with PP&L in the wholesale market, (2) SER's future ability to compete with PP&L in the retail market, and (3) PP&L's efforts to thwart SER's present and future competitive undertakings.

If further amendment of the Amended Complaint will not result in a determination that the newly amended complaint is sufficient to withstand a renewed motion under Rule 12(b)(6), we need not permit the amendment. *See Dykes v. Southeastern Pa. Transp. Auth.*, 68 F.3d 1564, 1572 n.7 (3d Cir. 1995), *cert. denied*, U.S. , 116 S. Ct. 1434, 134 L. Ed. 2d 556 (1996); *Colburn v. Upper Darby Township*, 838 F.2d 663, 666 (3d Cir. 1988). After review of SER's new assertions, we conclude that SER's proposed amendments will not enable it to withstand a renewed motion to dismiss.

SER's physical ability to generate sufficient power to serve directly both wholesale and retail customers is not relevant. First, SER's Amended Complaint clearly states that SER is contractually bound to sell its power exclusively to PP&L. Second, SER concedes that at the time itfiled its Amended Complaint it was legally prohibited from competing with PP&L and that retail competition did not begin until pilot programs were initiated in April of 1997. Thus, SER could not compete with PP&L, even if it had the capacity to do so. We conclude that SER's proposed amendments will not enable

it to withstand a renewed motion to dismiss, and we will not grant SER leave to amend further its Amended Complaint.[18]

VI.

We do not decide whether PP&L's generation curtailment policy violates the Power Purchasing Agreement, PURPA, or Pennsylvania regulations. We also do not decide whether PP&L's practices will violate the antitrust laws in the future. We are limited to deciding whether SER can plead that, at the time the Amended Complaint was filed, PP&L was unlawfully monopolizing or attempting to monopolize the markets for the provision of electric energy to retail consumers or wholesale resellers. SER cannot meet this burden. The Power Purchasing Agreement and the law prevent SER from competing with PP&L in the relevant markets. SER cannot, therefore, plead antitrust injury. We will affirm the judgment of the district court.[19]

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[18] We do not decide whether the district court should have construed the two footnotes as a motion for leave to amend, and we, therefore, do not decide whether the district court abused its discretion in failing to grant such a motion. *Miklavic v. USAir Inc.*, 21 F.3d 551, 553 (3d Cir. 1994) (decision to dismiss with prejudice without granting leave to amend is subject to appellate review under abuse of discretion standard). It is sufficient that we find that SER is not entitled to amend its Amended Complaint.

[19] SER also argued that the district court erred in granting PP&L's motion for a stay of proceedings and referring the case on primary jurisdiction grounds to the PUC for an administrative proceeding to determine the regulatory propriety of PP&L's generation curtailment policies. *See United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-64, 77 S. Ct. 161, 165, 1 L. Ed. 2d 126 (1956) (discussing application of primary jurisdiction doctrine); *Fulton Cogeneration Assocs. v. Niagara Mohawk Power Corp.*, 84 F.3d 91, 97 (2d Cir. 1996) (same). Given our disposition of the other issues raised in this appeal, we need not decide SER's challenge to the district court's stay order.

STAPLETON, Circuit Judge, concurring:

I believe that the Power Purchase Agreement between SER and PP&L is susceptible of an interpretation that SER's duty to sell exclusively to PP&L is limited to the first 79.5 megawatts of its output. Therefore, I cannot agree with the majority that the "contract prevents SER from competing with PP&L." Maj. Op. at 12.

Nonetheless, I concur in the judgment to affirm the district court's dismissal of SER's complaint with respect to the retail market on the alternative ground on which the majority relies: by law there was no competition in the retail market during the period complained of in the complaint. Competition in the retail market is currently being phased in, *see* Pennsylvania Electricity Generation Customer Choice and Competition Act, 66 Pa. Cons. Stat. Ann. § 2801 *et seq.*, but there was no competition prior to the passage and implementation of the recent legislation. Without a competitive market, SER could not have been PP&L's competitor, and there cannot have been antitrust injury.

I also agree that SER's complaint with respect to the wholesale market should be dismissed, but I reach this conclusion for a different reason than the majority. SER has not alleged that it has sold, attempted to sell, or even intends to sell any excess capacity (i.e. above what it provides under the Agreement to PP&L) on the wholesale market to others for resale. The proposed amendment to the complaint would only clarify SER's interpretation of the Power Purchase Agreement and allege that SER is capable of producing more than 79.5 megawatts. Thus, even if the amendment were permitted, the complaint would still be devoid of an allegation that SER has competed, or has even formulated a plan to compete, with PP&L in some designated wholesale market. SER's conclusory allegation that it is a competitor with PP&L

in the wholesale market is entirely without factual context. Even on a motion to dismiss, a district court need not credit unsubstantiated conclusions and bald assertions. *See Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 971 (1st Cir. 1993); Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1357 at 311 (1989). In the absence of some description of past or anticipated competition between SER and PP&L in a wholesale market, there is no basis for inferring the existence of, or potential for, antitrust injury.

For these reasons, I would affirm the judgment of the district court.

Present SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and McKEE, Circuit Judges, and RESTANI, Judge, Court of International Trade

SUR PETITION FOR REHEARING

June 2, 1997

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judge who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 95-4885

SCHUYLKILL ENERGY RESOURCES, INC.,

v.

PENNSYLVANIA POWER & LIGHT COMPANY,

May 20, 1996, Decided
May 21, 1996, FILED, ENTERED

MEMORANDUM

Edward N. Cahn, United States District Judge

Plaintiff Schuylkill Energy Resources ("SER") filed this lawsuit against Pennsylvania Power & Light Company ("PP&L"), alleging federal antitrust law violations and several pendent state law claims. Currently before this court is PP&L's motion to dismiss. Upon consideration of the Amended Complaint, Defendant's Motion to Dismiss, Plaintiff's response thereto, oral argument, as well as supplemental letter briefs submitted by both parties, this court grants Defendant's motion to dismiss SER's federal antitrust claims. This court declines to exercise supplemental jurisdiction over Plaintiff's related state law claims pursuant to 28 U.S.C. § 1367(c)(3) (1994).

I. Relevant Legal Standard and Factual Background

In evaluating a motion to dismiss a complaint, the court must accept as true all well-pleaded allegations in the complaint, view the complaint in the light most favorable to the plaintiff, "'and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief.'" *Colburn v. Upper Darby Township*, 838 F.2d 663, 665-66 (3d Cir. 1988) (citation omitted), *cert. denied*, 489 U.S. 1065, 103 L. Ed. 2d 808, 109 S. Ct. 1338 (1989). Therefore, for the purpose of evaluating this motion to dismiss, this court accepts SER's version of the facts as set forth in its amended complaint. A summary of SER's factual allegations follows.

SER is an independent power producer ("IPP") that runs a plant ("the Plant") to produce energy out of culm (coal waste). The Plant is a qualifying cogeneration facility ("QF") as defined by the Federal Power Act, 16 U.S.C. § 791a *et seq.* (1994), the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. § 2601 *et seq.* (1994), and 52 Pa. Code § 57.31 *et seq.* (1996). On October 17, 1986, SER and PP&L entered into a twenty-year Power Purchase Agreement (the "Agreement"), according to which SER is required to sell energy exclusively to PP&L, and PP&L is required to purchase SER's entire net power output up to 79.5 megawatts. Pursuant to the power purchase agreement, PP&L is permitted to purchase less than SER's total electric energy output only when curtailed purchases are necessary for PP&L "to make repairs, changes, tests or inspections, or for reasons of an actual or potential system Emergency, Forced Outage, Force Majeure or PP&L System operating condition which necessitates such disconnections or curtailments." (Am. Compl. ¶ 31 (quoting Agreement, Art. 9, ¶ E).) A "system emergency" is defined under the Agreement as "any condition

on the PP&L System or PJM System which, in PP&L's opinion, may disrupt service to customers or endanger life or property."[1] (Am. Compl. ¶ 32 (quoting Agreement, Art. 1, ¶ CC).) According to SER, PP&L has construed "system emergency" to include "minimum generation emergencies" and "minimum generation events" (hereinafter referred to as "MINGENS") identified by PJM, which occur when the aggregate power demand within the regions serviced by PJM is expected to fall below its normal or emergency minimum generation floor level and PJM cannot sell the pool's excess power to other power pools or reduce PJM member company purchases. SER alleges that when MINGENS are issued by PJM, PP&L has a policy of reducing purchases of energy from IPPs with high energy prices first and cutting purchases from PP&L-owned energy producers less severely. Pursuant to the Agreement, PP&L may not curtail purchases of SER's output of electricity "for reasons of economic dispatch." (Am. Compl. ¶ 42 (quoting Agreement, Art. 9, ¶ E).) SER alleges that the vast majority of PP&L's declarations of system emergencies are disingenuous and are actually declared for reasons of "economic dispatch."[2] SER complains that when PP&L curtails purchases of energy from SER, SER must burn oil as supplementary fuel to maintain its electric energy output

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[1] PJM is the Pennsylvania-New Jersey-Maryland Interconnection, a power pool maintained by an unincorporated association of approximately eight member electric utilities, of which PP&L is a member.

[2] According to SER, between July, 1989 and July 1994, PP&L curtailed power purchases from SER sixteen times, resulting in an aggregate revenue loss to SER of $221,630.00. However, from July, 1994 to July 1, 1995, PP&L curtailed power purchases from SER eighty-three times, resulting in an aggregate revenue loss to SER of $ 1,635,704.00. (Am. Compl. ¶¶ 47-48.)

at great cost to SER, loses revenues of selling energy, and incurs other incidental costs.

II. Discussion

SER alleges two separate federal antitrust violations by PP&L under the Sherman Act, 15 U.S.C. § 1 *et seq.* (1994), (hereinafter referred to as Counts I and II). In Count I, SER alleges a claim of monopolization in violation of Section 2 of the Sherman Act.[3] In Count II, SER alleges a claim of attempt to monopolize in violation of Section 2 of the Sherman Act.[4] To establish a claim of actual monopolization under Section 2 of the Sherman Antitrust Act, the plaintiff must demonstrate that (1) the defendant possesses monopoly power in a relevant market, and (2) the defendant has wilfully acquired or maintained that power "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). In addition, the plaintiff must show that he suffered a causal antitrust injury. *City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992); *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1542 (W.D. Pa. 1984) (citations omitted).

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[3] Specifically, SER alleges that "PP&L's pattern of illegal curtailments of purchases of electric power from SER and other similarly situated qualifying facilities is intended, and serves in fact, to reduce or eliminate competition in the generation and distribution of electricity in interstate commerce and, thereby, to enhance and to expand PP&L's existing monopoly, all in violation of Section 2 of the Sherman Act." (Am. Compl. ¶ 68.)

[4] Specifically, SER alleges that PP&L's actions constitute "an attempt to monopolize the electric energy sales market by preventing competitors from operating viably within the market." (Am. Compl. ¶ 72.)

In order to state a claim of attempted monopolization under Section 2 of the Sherman Act, the plaintiff must allege (1) specific intent to monopolize the relevant market, (2) exclusionary, predatory, or anticompetitive conduct directed at accomplishing the unlawful objective, and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993); *Barr Lab., Inc. v. Abbott Lab.*, 978 F.2d 98, 112 (3d Cir. 1992). In addition, "as with all antitrust claims, the plaintiff must also allege that the harm suffered is an 'antitrust' injury." *Chambers*, 590 F. Supp. at 1544; *see also Syufy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 998-99 (9th Cir. 1986) ("It is clear that a case of attempted monopolization cannot be sustained in the absence of any of the following elements: (1) specific intent to monopolize, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) causal antitrust injury.") (citations omitted), *cert. denied*, 479 U.S. 1031, 93 L. Ed. 2d 830, 107 S. Ct. 876 (1987), and *cert. denied*, 479 U.S. 1034, 93 L. Ed. 2d 838, 107 S. Ct. 884 (1987).[5]

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[5] SER correctly argues that its failure to allege current, actual injury to competition is not fatal to its attempted monopolization claim. However, in order to state a claim of attempted monopolization, there must be a threat of antitrust injury, which is not present in the instant case: "The offense of attempted monopolization need not cause actual market damage, but need merely threaten to produce the type of market damage contemplated in the antitrust laws. The relevant test is whether the 'dangerous probability of success,' if it had materialized, would have caused the type of market damage the antitrust laws seek to prevent." *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 994 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100, 80 L. Ed. 2d 126, 104 S. Ct. 1594 (1984).

This court grants PP&L's motion to dismiss because SER has not alleged antitrust injury. Antitrust claims can only stand for those alleged activities that come within the scope of protection of the antitrust laws, that is, those that constitute "antitrust injury." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990); *see also HyPoint Technology, Inc. v. Hewlett-Packard Co.*, 949 F.2d 874, 877 (6th Cir. 1991) (stating that in an antitrust action, courts "are instructed in looking at the cause of the injury to look at whether the conduct was anticompetitive, and if it was not anticompetitive, standing is not shown"), *cert. denied*, 503 U.S. 938, 117 L. Ed. 2d 623, 112 S. Ct. 1480 (1992).[6]

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[6] SER cites *Mahone v. Addicks Util. Dist. of Harris County*, 836 F.2d 921, (5th Cir. 1988), in support of its argument that it need not allege an antitrust injury in a Section 2 claim:

> By focusing his complaint on monopolization, attempt to monopolize, and conspiracy to monopolize, [the plaintiff] appears to be asserting a violation of section 2 of the Sherman Act. . . . Injury to competition is presumed to follow from the conduct proscribed by section 2; therefore, proving an injury to competition is not an element of a monopolization-based antitrust claim. . . . Since [the plaintiff] would not have to prove an injury to competition to prevail under section 2, it was unnecessary for him to support his section 2 claim with an allegation of competitive injury.

Id. at 939. However, this court is not persuaded by this language in *Mahone* for two reasons. First, as discussed previously in this opinion, several other courts have held that antitrust injury is a necessary element of a Section 2 claim. *City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992); *Syufy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 998-99 (9th Cir. 1986); *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1542 (W.D. Pa. 1984). In addition, even if antitrust injury was not an element of a Sherman Act Section 2 claim, it is important to note that the *Mahone* court agrees that

SER has alleged a list of its damages, including the following:

> a) loss of electricity sales revenues which, under the terms of the Power Purchase Agreement, cannot be recouped through sales to third parties; b) increased costs to purchase fuel oil and electricity to keep the Plant operating during severe curtailment periods and to pay the extra personnel and ancillary expenses associated with dramatic reductions in Plant output; and c) accelerated depreciation of the Plant through increased stress upon vital components attributable to excessive cycling.

(Am. Compl. ¶ 70.) Such injuries to an individual competitor company, without allegations of injury to competition or consumer welfare, are insufficient as a matter of law to establish a violation of federal antitrust law. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977) ("the antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*'") (citation omitted); *Chambers*, 590 F. Supp. at 1544 (stating

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when a private plaintiff brings an action for actual and treble damages under the antitrust laws, as SER has in the instant case, (Am. Compl. at 20, ¶¶ A-B), the plaintiff must allege antitrust injury:

> However, [the plaintiff] is using his antitrust claim to recover actual and treble damages--damages which can only be recovered through a private civil suit brought pursuant to section 4 of the Clayton Act. . . .
>
> Unlike section 2 of the Sherman Act, section 4 of the Clayton Act comes with a specific injury requirement. Explicitly, the section permits suits only by those persons "who shall be injured in [their] business or property by reason of anything forbidden in the antitrust laws."

Mahone, 836 F.2d at 939 (quoting 15 U.S.C. § 15).

that injuries to plaintiff's own business do not support a claim under Section 2 of the Sherman Act absent allegations of injuries to competition as a whole). However, SER also alleges that PP&L's curtailment of energy purchases from SER and other IPPs harms competition and consumer welfare in several ways:

> by keeping PP&L's base rate artificially high, by depriving consumers within PP&L's service area of energy sources other than those owned and/or exploited by PP&L (which, in turn, reduces the reliability of electric service provided), and by reducing the availability to consumers of power produced using alternative, environmentally pro-active energy sources.

(Am. Compl. ¶ 66.) However, PP&L has no unilateral ability to change its rates; any increase or decrease in rates must be filed with the PUC and conform to PUC regulations or orders. *See* 66 Pa. Cons. Stat. §§ 1301, 1308(a) (1993). In addition, although the reliability and environmental qualities of energy sources may be worthwhile concerns, they are not within the scope of federal antitrust laws. Courts have rejected attempts to expand the scope of the antitrust laws to encompass noneconomic interests. *See, e.g., National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 693-95, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978) (rejecting an

attempt to incorporate concerns for noneconomic factors, such as risks to safety and health, into antitrust analysis).[7]

The instant case is factually similar to *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1194 (W.D.N.Y. 1995). In *Kamine*, a utility company was unwilling to purchase power from a cogenerator at the price set in a power purchase agreement. *Id.* at 1196. As in the instant case, the cogenerator accused the utility of trying to drive it out of business so that the utility company could maintain its monopoly as producer and seller of electricity within its service area. *Id.* The *Kamine* court ruled that the cogenerator would not be granted a preliminary injunction ordering the utility to comply with the power purchase agreement because the cogenerator did not demonstrate a likelihood of success on the merits of its antitrust claim. *Id.* at 1203. Although this court acknowledges that the *Kamine* court was not ruling on a motion to dismiss, this court agrees with that court's conclusion that the basic thrust of the Kamine cogenerator's claim, which is essentially the same as SER's claim, was not governed by antitrust law:

> A . . . weakness with Kamine's case is that it is based more on alleged violations of PURPA than of the antitrust laws. Although actions that violate PURPA could conceivably violate the antitrust laws

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[7] In fact, SER's own allegations could be construed as demonstrating that PP&L's actions are actually procompetitive: SER alleges that it is PP&L's policy to "curtail[] purchases of electric energy *first* from independent power producers to whom PP&L must pay the highest price for electricity." (Am. Compl. ¶ 40.) As a matter basic economic theory, the loss of a higher price supplier would not tend to chill competition or raise prices to consumers; instead, it would seem likely to produce the opposite effect.

> as well, they are not the same thing, and one does not necessarily flow from the other.

Id. at 1203-04. The *Kamine* court went on to state that the power purchase agreement at issue in that case "was not created as a result of market forces or a competitive process," but was instead "a creature of a statutory scheme set up for reasons that have nothing to do with competition per se." *Id.* at 1207. In the instant case, the gravamen of SER's complaint is that PP&L is not complying with the terms of the Power Purchase Agreement. This court agrees with the analysis of the *Kamine* court that such actions are not a concern of the federal antitrust laws, but are instead, a concern under PURPA.[8]

SER relies on language from a Commonwealth Court of Pennsylvania case in support of its argument that its allegations are sufficient to survive the motion to dismiss for failure to state a federal antitrust claim:

> Utilities are hostile to non-utility generation. Utilities earn a return only on their property which is used and useful in producing and delivering power. The

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[8] A recent opinion in a state court case related to the instant case, *Pennsylvania Power & Light Co. v. Schuylkill Energy Resources, Inc.*, No. 95-C-2810, slip op. (Ct. C.P. Lehigh County Apr. 30, 1996), lends support to this conclusion. PP&L filed a state court action against SER for breach of contract and fraud, and against SER's affiliated company, Reading Anthracite Company ("RAC"), for civil conspiracy. In response, SER filed a motion for preliminary injunction seeking to enjoin PP&L from reducing the rate it pays to SER to purchase its energy production. Judge Thomas Wallitsch of the Court of Common Pleas of Lehigh County granted the preliminary injunction, stating that "PP&L violated PURPA and the regulations by not submitting this dispute to FERC for its determination." *Id.* at 9. Although PP&L may have violated PURPA, this court concludes that SER has not stated a claim under federal antitrust laws.

> utilities earn no return on costs, such as those incurred to purchase fuel or power from other sources such as QFs. The enactment of PURPA flowed from the awareness that utilities are hostile to non-utility generation since such generation is clearly in competition with the utilities and displaces generation plant the utility would add to rate base, or power purchases from sister utilities.

Lehigh Valley Power Comm. v. Pennsylvania Pub. Util. Comm'n, 128 Pa. Commw. 259, 563 A.2d 548, 552 n.10 (Pa. Commw. Ct. 1989). However, the *Lehigh Valley Power* court was not addressing antitrust issues in that case. Nonetheless, SER argues that this language supports its argument that to the extent that QF power generation competes with power generation by PP&L, PP&L will shrink as a going concern, which will in turn prevent them from successfully achieving rate-base increases. In other words, SER argues that by squeezing QFs from the market, consumers will ultimately be harmed by possible rate base increases. This court finds that this allegation of speculative future antitrust injury, especially in the context of a highly regulated industry, is insufficient to survive PP&L's motion to dismiss. *Cf. Austin v. Blue Cross & Blue Shield of Alabama*, 903 F.2d 1385, 1392 (11th Cir. 1990) (affirming district court's dismissal for lack of antitrust

standing because "the claimed antitrust injuries are extremely remote from the actions complained of").[9]

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[9] Alternately, PP&L argues that the challenged conduct of PP&L is immune from antitrust liability under the state action doctrine. The United States Supreme Court, in *Parker v. Brown*, 317 U.S. 341, 350-52, 87 L. Ed. 315, 63 S. Ct. 307 (1943), held that federal antitrust laws were not intended to reach state-regulated anticompetitive activities. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980), the Supreme Court established a two-pronged test to determine when a private party's anticompetitive actions are immune from antitrust liability: (1) the conduct had to be performed pursuant to a clearly articulated state policy; and (2) the conduct had to be actively supervised by the state. *Id.* at 105.

To satisfy the first element of the *Midcal* state-action immunity test, "a private party acting pursuant to an anticompetitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct." *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560, 1568 (11th Cir. 1996) (citation omitted). Instead, "as long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied:" *Id.* (citation omitted). Pennsylvania's laws regarding public utilities satisfy the first prong of the *Midcal* test. *See, e.g.*, 66 Pa. Cons. Stat. § 501(b) (1993) (providing the PUC with broad authority to "supervise and regulate" public utilities doing business in Pennsylvania); 52 Pa. Code § 57.34 (regulating the relationship between public utilities and QFs); *see also TEC Cogeneration Inc.*, 76 F.3d at 1568 (agreeing with the district court that Florida "has an obvious and clearly articulated policy to displace competition with regulation in the area of power generation and transmission" because Florida "has two statutory policies regarding power generation and transmission: a policy favoring monopoly power in Florida electric utilities, and a policy of encouraging development of Florida cogeneration facilities").

The second prong of the *Midcal* test requires that the conduct be actively supervised by the state:

> "The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of

In summary, this court grants PP&L's motion to dismiss SER's federal antitrust claims because SER has failed to allege antitrust injury. This court declines to exercise supplemental jurisdiction over Plaintiff's related state law claims pursuant to 28 U.S.C. § 1367(c)(3). An appropriate order follows.

Edward N. Cahn

---

supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."

Federal Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 634, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992) (citation omitted). In *Ticor*, the Supreme Court held that the unexercised theoretical power of a state regulatory agency to review joint rates set by private parties did not meet the "active state supervision" requirement: "The mere potential for state supervision is not an adequate substitute for a decision by the State." *Id.* at 638. The issue of state action immunity can be decided on a motion to dismiss. *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 997 (3d Cir.) ("The state action exemption cases clearly indicate that this issue involves a question of law . . . . Thus, the question of whether a governmental entity is subject to Sherman Act liability has generally been resolved on a motion to dismiss or a summary judgment motion."), *cert. denied*, 459 U.S. 1022 (1982). However, this court declines to dismiss this case on the grounds of state action immunity without a factual inquiry to determine whether the "active state supervision" prong of the *Midcal* test is satisfied. The need for factual inquiry is especially important because the issue of state action immunity is an affirmative defense as to which PP&L bears the burden of proof. *Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 95-4885

SCHUYLKILL ENERGY RESOURCES, INC.,
v.
PENNSYLVANIA POWER & LIGHT COMPANY,

ENTERED 5/21/96

ORDER

AND NOW, this 20 day of May, 1996, upon consideration of Defendant's Motion to Dismiss, Plaintiff's response thereto, oral argument, and supplemental letter briefs submitted by both parties, it is hereby ORDERED as follows:

1. Defendant's Motion to Dismiss is GRANTED and Plaintiff's federal antitrust claims are DISMISSED WITH PREJUDICE; all other claims are DISMISSED WITHOUT PREJUDICE;
2. All pending motions are DISMISSED AS MOOT.
3. The Clerk of Court is directed to close the docket for statistical purposes.

BY THE COURT:

Edward N. Cahn, Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-1447

SCHUYLKILL ENERGY RESOURCES, INC.,
Appellant

v.

PENNSYLVANIA POWER & LIGHT COMPANY

Present: SLOVITER, *Chief Judge,*
BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA[,] COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, *Circuit* Judges, and RESTANI, *Judge,* Court of International Trade.*

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

---

*Judge Restani's vote was limited to rehearing before the original panel.

APPENDIX D

CASE NUMBER 96-1447

SCHUYLKILL ENERGY RESOURCES, INC.

v.

PENNSYLVANIA POWER & LIGHT COMPANY

– – –

SCHUYLKILL ENERGY RESOURCES, INC., Appellant

– – –

Argument Taken: Wednesday, February 6, 1997

– – –

BEFORE: Honorable Walter Stapleton
Honorable Carol Mansmann
Honorable Jane Restani

– – –

Appeal of the Order of the District Court for the Eastern District of Pennsylvania, dismissing the Plaintiff Ex Rel. pursuant to Federal Rule of Civil Procedure 12(B)(1).

– – –

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Registered Professional Reporters
Eleven Penn Center, Suite 600
Philadelphia, PA 19102
(215) 561-2220

APPEARANCES:

MARY HUWALDT, ESQUIRE
CAPLAN & LUBER
40 Darby Road
Paoli, PA 191301

Counsel for the Appellant

GLEN R. STUART, ESQUIRE
MORGAN, LEWIS & BOCKIUS, LLP
2000 One Logan Square
Philadelphia, PA 19103

Counsel for the Appellee

* * * * * * *

* * * as it existed at the time the complaint was drafted, was, yes, for the wholesale of SER's electric energy that it generates over and above the 79.5 megawatts that it is obligated to sell to PP&L. And also the market for the sale of that product to PP&L's retail consumers by virtue of the pass-through of the product through PP&L to PP&L's ratepayers.

PP&L, by virtue of the cost-recovery mechanism earns no profit and no return on the energy that it takes from SER and that it passes on to its consumers. Therefore, PP&L is in a position of competing directly with SER for the sale of electric energy to its own rated payers at the retail level, in addition to the sale of the energy at the wholesale level.

Now that we have the Electricity Deregulation Act commencing in —

THE COURT: Wait, wait, wait a minute. Before we get there, I've got — I understood your brief to say — to advance three theories by which competition is lessened by the practice that you challenge of Pennsylvania curtailments and

exaggerating the magnitude of the use and useful nature of its rate base.

THE COURT: All right. Would you go back and tell me with respect to your first theory about the rate base? What's a relevant market; is it a retail market or a wholesale market?

You're talking about lessening some competition in some market; now, what market is this?

MS. HUWALDT: Both of those markets.

THE COURT: Pardon me?

MS. HUWALDT: Both of those markets. The wholesale market is one market in which competition is affected, and the retail market is another market in which competition is affected.

THE COURT: Well, let's start with the retail market. I didn't think there was any competition in the retail market. How can that be?

MS. HUWALDT: There is now. Particularly —

THE COURT: But at the time that you brought this action, at that time, the District Court ruled —

MS. HUWALDT: Mm-hmm.

THE COURT: — that there wasn't any. And today there isn't any.

MS. HUWALDT: No, today there is.

THE COURT: Not until a couple of months pass.

MS. HUWALDT: The Pennsylvania deregulation legislation was signed into law on December 3rd of 1995. It was after Judge Cahn of the District Court rendered his decision.

THE COURT: When does it become effective? When can you compete in the retail market against PP&L?

MS. HUWALDT: The phase-in of competition becomes effective January 1st of this year. The phase-in of competition is now occurring.

So the first opportunity for customers to choose their electric generation suppliers is April 1st of the of this year, less than two months from today. According to the retail pilot program —

THE COURT: Okay. But at the time the District Court made this decision, which is what we're reviewing, you had no opportunity in the retail market other than as a pass-through, other than to sell to or enforce the contract that you had of PP&L?

MS. HUWALDT: I think, Your Honor, that you're obliged to review the District Court's decision under the law as it exists today.

And the fact that there was an intervening change in the law, I think, affects — you have to look at the case today. You have to — you can't pretend that the deregulation legislation was never passed. It was, and it's here.

The other part of that is that Judge Cahn said, Well, it's speculative that there will ever be competition. It was not speculative. Before the District Court rendered its decision, we were aware that the deregulation legislation was pending.

We knew that there was a bill out there. I think at the time of the briefs, it was in Committee. And it was subsequently passed to the House and passed and then signed by of Governor.

THE COURT: But do you have facts upon which you could allege that there is a — that come April 1st, there is a problem that we ought to look at? I mean, aren't you hampered by the fact that —

MS. HUWALDT: I'm saying — I'm saying that the —

THE COURT: Aren't you hampered because the facts are set?

MS. HUWALDT: I'm sorry?

THE COURT: The facts are set here?

MS. HUWALDT: Yes, the facts are set. The facts are set that as of April 1st of 1997, consumers will be able to choose their electric energy supplier.

THE COURT: Yeah, but how do we know what the market's going to look like? I mean, there may be thousands of people in the marketplace or firms in the marketplace.

And how can we — how can we assess — you're saying that they're doing something that's going to lessen competition, an immediate threat of lessening competition in a particular market?

MS. HUWALDT: That's right.

THE COURT: Now, did you allege things in the complaint? What do you allege in your complaint; what the market, following deregulation, is going to be like?

MS. HUWALDT: I'll tell you first that it's true that we don't know exactly what the market will look like, and it's my client's obligation as the plaintiff to prove it. And we have an opportunity, before we're obliged to prove it, to conduct discovery and to develop evidence and to develop a record.

This case, having been dismissed on the pleadings, we never had an opportunity to prove it, but we have alleged. And what we have alleged is that SER will be able to offer its product to consumers, and that consumers will prefer SER's product for two reasons — for three reasons:

One, because it is environmentally beneficial and it is reliable; therefore, it has a quality that consumers will choose over even potentially less expensive power.

We also asked the District Court to permit us to amend the complaint to allege that we can sell our products to consumers cheaper than PP&L can sell it. He denied us the opportunity to amend — to make that allegation.

We asked for the opportunity to do that. He denied it. We think we can sell it cheaper. We think our process, which utilizes a waste fuel, is much cheaper than a nuclear process. And we — we believe that we're entitled to the opportunity to prove that. We were denied the opportunity to prove it.

The deregulation legislation is here. As I say, the phase-in is commencing immediately, according to PP&L's retail pilot program. And according to the PUC order, consumers will be able to choose their electric generation supplier as of April 1, 1997.

Now that's not the entire market. That's a subset of it is.

THE COURT: Mm-hmm.

MS. HUWALDT: But it's a beginning. So the decision of SER's inability to prove antitrust injury is incorrect. The ability to prove it is here, and it's now. And if we're allowed to go ahead and develop a record, we're satisfied that we'll be able to sustain our burden of developing the facts to prove that injury.

THE COURT: This is not just a change in the law. I mean, it is true that if you have a change in the law that amended the antitrust law while the case was still pending, you apply it.

But what you're saying is that there's going to be a new market that doesn't currently exist, and that we suspect that the market's going to be such that if they continue this

practice that they have in the past, that it may somehow affect that market.

But if that — I mean, isn't that for another suit? I mean, don't we review what the District Court had before it at the time in its allegations about what the marketplace looked liked?

MS. HUWALDT: The allegations that the District Court had in front of it was our request to amend, to include allegations concerning the pending deregulation of the electric utility industry.

If I can ask Your Honor a question, can you look at the pleadings, and can you find anything in there that says SER cannot compete in a deregulated environment? And what basis is there for saying now on the pleadings that before SER has had an opportunity to develop evidence and to present its case that it can't do that?

It's the obligation of the District Court to assume that the allegations of the plaintiff are true. And if SER alleges that it can compete in a deregulated environment, then the Court has the obligation to assume that that's true.

THE COURT: Well, the District Court thought that you had alleged — I guess it was in paragraph 12 — that you were at the high end of the market.

MS. HUWALDT: No.

* * * * * * *

* * * electricity energy first from independent power producers to whom PP&L must pay the highest price for electricity.

That is, that allegation says — in that little context in which it should stay — that faced with a so-called (unintelligible) circumstance, PP&L chooses among those independent power producers from whom it is purchasing power

who have the highest price, and it curtails from that one first.

It does not say that PP&L's price — that SER's price is higher than PP&L's price, and that's what we're looking at.

SER has asked to be permitted to allege that it can sell its product cheaper than PP&L, and it has alleged that it can make its product cheaper than PP&L.

Paragraph 40 talks about a comparison among QF's, or among independent power-users. It does not talk about a comparison between SER and between PP&L.

In fact, the next paragraph goes on to say that PP&L has a policy and practice of curtailing electric energy output from coal, * * *

* * * * * * * .

And the Courts have routinely found, including the United States Supreme Court, that while price is important and the ability to control price is important in determining whether an actor has monopoly power, and price is also important in determining whether there is still —

THE COURT: Are we still talking about the wholesale market here? We're talking about pre-deregulation?

MS. HUWALDT: Sure, as it applies to the wholesale — as it applies to all of the markets.

THE COURT: Okay. But let's talk wholesale right now.

MS. HUWALDT: But it does apply to the wholesale market. Consumers have the right to choose among the bundle of qualities that make up particular products.

THE COURT: But they don't, they don't. That's — I mean, I don't have a choice between kilowatts. I just turn on the light switch. I mean, it's generic. I can't choose between your kilowatt and PP&L's generated kilowatts as a consumer.

MS. HUWALDT: As of April 1st, you can.

THE COURT: I know, but we were talking about the wholesale market prior to that.

MS. HUWALDT: The —

THE COURT: That's what you were talking about, I'm sure.

MS. HUWALDT: In the wholesale market, an industrial consumer — for example, a pierogi plant that happens to be down the street from SER's electric generation plants — can attach a transmission line to SER's line. And it can say, I want to purchase your power. And it can do that.

THE COURT: And does that run through PP&L?

MS. HUWALDT: No.

THE COURT: Okay, but we're — the consumer here in the wholesale market is PP&L.

MS. HUWALDT: No, the consumer is either the industrial consumer or the rate-payer. As a result of — PP&L has nothing * * *

* * * * * * *

THE COURT: Sure.

MS. HUWALDT: — to send it on to the retail-level consumers.

We're also saying that PP&L's conduct is going to put us out of business so that we won't have the choice to sell it directly to wholesalers who might want to build their own transmission lines.

THE COURT: Now, pre-deregulation, you didn't have a choice; you just went directly to PP&L?

MS. HUWALDT: Wholesale, yes. We could sell at the wholesale level.

THE COURT: Okay.

THE COURT: Over the 79 —

MS. HUWALDT: Over the 79.5 megawatts. That's right.

THE COURT: Sure.

MS. HUWALDT: That's right.

THE COURT: Okay.

THE COURT: Thank you. We'll get you back on the rebuttal.

MS. HUWALDT: Okay.

— — —

THE COURT: Is there a rebuttal?

MS. HUWALDT: There have been so many factual issues discussed here, I feel like we're on a motion for summary judgment.

And I think, frankly, that's unfair to my client because this is a motion to determine whether it was appropriate to dismiss on the pleadings and whether it was appropriate to do that without giving my client the right to amend its complaint.

I can argue with my colleague all day long. I can discuss all day with the Court, all day long what the facts are going to show. And I don't think we should get caught up in an argument about what the facts are.

My client —

THE COURT: But aren't you stuck with the allegations of your complaint?

MS. HUWALDT: I'm stuck with — yes.

THE COURT: Where —

MS. HUWALDT: I'm stuck with the allegations of my complaint and also my request to the District Court to amend the complaint to include the allegations — additional allegations that I think should be in there.

The discussion concerning paragraph 40 of the complaint, that the comma I placed in there somehow constitutes an admission that my client does not have the right to sell the energy it produces above 79.5 megawatts, I think, is going a little bit far for an appellate argument.

THE COURT: Well, that's in 22, and the line specifically says SER is required to sell exclusively to PP&L, comma. And then moves along, and PP&L is required to purchase.

But with respect to what your client's required to do, it says to sell exclusively to PP&L, and then there's the questionable comma.

MS. HUWALDT: It says — first of all, I have arguments with my partner all day long about where commas belong in complaints, and we disagree.

THE COURT: Well, it's the word "exclusively," which is the problem.

MS. HUWALDT: Yes, exclusively up to 79.5 megawatts. That's the way the contract reads.

THE COURT: I see.

MS. HUWALDT: It's exclusively up to the first 79.5 megawatts. We have to sell it to PP&L and we don't have a choice to give it to anybody else over and above that we can sell it to whoever we want, subject to the appropriate restraints.

So I think the issue about whether or not the contract permits us to participate in the retail pilot program, again, is a factual issue according to the allegation of the complaint which the District Court was obliged to accept as true, we

don't have the ability to sell it to consumers. And we do have the ability to sell it starting April 1st of 1997.

PP&L says, well, it's only five percent of their consumers; and that may not be much to them, but it's a great deal to my client.

And to face the prospect of being forced out of business at this point today because of the curtailments which are ongoing so that it will have no opportunity to participate in the free marketplace which is imminent, I think is a classic antitrust violation.

The curtailments are happening now, and if they don't stop, my client is going to go out of business. And if my client goes out of business, it won's be able to participate in the restructured market, no matter what it is. That's antitrust violation.

Now, the argument that we don't know what the market is or what it's going to look like, well, we don's know specifically what it is. We have a lot of information about it.

Look at California. They did the same deregulation legislation substantially before Pennsylvania did, so they're going through all of the deregulation growing pains before Pennsylvania. There is a wealth of information about what the market is going to look like.

Most of the states in the United States are considering deregulation legislation. It's not a thing that's isolated to Pennsylvania. It's happening all over the place. There's expert addressing it everywhere. I feel confident that my client can prove what the market will look like and that it will be harmed, that consumers will be harmed if it is not allowed to participate in that market.

I just would like to emphasize that the Court keep in mind that my client, SER, was denied leave to amend its complaint. The reference appeared in two footnotes.

You were directed to page 203-A of the appendix. In footnote 1, SER says, should the Court decide that these assertions or others discussed in this letter must be expressly pled, SER asks the Court to consider this letter as a request to amend the complaint appropriately.

It reiterates the request in another footnote. In that same letter brief, on page 207-A, SER says that while this issue could be resolved through discovery, SER now seeks leave to amend the complaint to recite the plant's actual capacity to generate at least 5.5 megawatts for potential sales to third parties in excess of the amount which it presently provides by contract to PP&L.

The procedural posture of the case is important in assessing the leave to amend. First of all, the Third Circuit has said you don't have to file a motion for leave to amend in order for a District Court's dismissal of the complaint to be reversed, and the party is to be given the right to amend.

You don't even have to ask for it. The Court can do it sua sponte. There is no rule saying that it has to be done by a Rule 15 motion. There is no rule that says it has to be done by any kind of motion at all.

And we have a circumstance where PP&L had filed a motion to dismiss its complaint. The District Court denied the motion without prejudice and stayed the case pending PUC evaluation. SER moved for reconsideration of the stay order. At oral argument on reconsideration of the stay order, the District Court says, I think we should renew the motion to dismiss. And it was done on the pleadings that were already on file. There were no new pleadings addressed.

The District Court at that time at oral argument requested that the party submit letter briefs concerning the factual issues they considered to be outstanding. We did that. Excuse me.

Those letter briefs are the ones that begin on 203-A, and the subsequent ones are included in the appendix where we outline the issues that we wanted to prove, including that we can sell to consumers for cheaper than PP&L could do, and that the deregulation environment was pending and that we needed that to be considered and that we wanted to allege that in the complaint, Judge Cahn, despite his request for the letter briefing, despite our comments and our request in the letter briefing for leave to amend, denied it.

He didn't expressly deny it; he didn't say the amendment would be futile. He just — I don't know — maybe he didn't think about it, or maybe he implicitly denied it. But he denied it and I think that's something — that procedural issue is very important.

And I would just encourage the Court to address also, in the event that it determines that it was not appropriate to dismiss the complaint, to address the primary jurisdiction argument so that we don't go back and face a stay again.

THE COURT: All right. We're going to have to cut you off now. Thank you. We appreciate your help.

— — —

APPENDIX E

[Letterhead, CAPLAN & LUBER, LLP, omitted in printing]

January 31, 1997

REPLY TO: PAOLI
VIA HAND DELIVERY

Clerk of the Court
United States Court of Appeals
for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Schuylkill Energy Resources, Inc., v.
Pennsylvania Power & Light Company
US Eastern District of PA NO. 95-4885
Court of Appeals Docket No: 96-1447

Dear Clerk:

Pursuant to Rule of Appellate Procedure 28(j), Appellant Schuylkill Energy Resources, Inc. ("SER") hereby submits to the Court supplemental legal authority which has arisen subsequent to the close of briefing in this matter and which is relevant to SER's arguments and to the oral argument to be held on February 6, 1997. The original and ten (10) copies of this letter and attachments are enclosed.

Exhibit A hereto is a true and correct copy of the Pennsylvania "Electricity Generation Customer Choice and Competition Act," amending Title 66 (Public Utilities) of the Pennsylvania Consolidated Statutes, which was signed into law by Pennsylvania Governor Ridge on December 3, 1996, effective January 1, 1997. This statute is relevant to SER's argument that the district court erred in finding

"speculative" SER's allegations that Appellant Pennsylvania Power & Light Company ("PP&L") illegally attempted to monopolize the electric generation industry by, among other things, attempting to eliminate SER as a competitor for the generation of electric energy in the pending deregulated environment. (Brief of Appellant, at pp. 18-23; Reply Brief of Appellant.) It is also relevant to SER's argument that the district court erred in finding that the allegation that PP&L eliminated the consumer's right to choose SER's environmentally proactive energy product was not relevant to the determination of whether PP&L's conduct harmed competition. (Brief of Appellant, at pp. 23-27; Reply Brief of Appellant.) Of particular relevance are §§ 2802, 2804, and 2806.

Exhibit B hereto is a true and correct copy of an Order the Pennsylvania Public Utility Commission entered on October 16, 1996 (received by SER on October 18, 1996), in matter P-00950995 (concerning a petition filed before the PUC by PP&L) ("the October 16 PUC Order"). The October 16 PUC Order reconsiders, pending resolution by the Federal Energy Regulatory Commission, the PUC's prior Order of April 11, 1996 in which the PUC referred PP&L's petition to an administrative law judge for recommended findings on jurisdictional and substantive issues. The October 16 Order indicates that the PUC has not yet determined whether it will exercise jurisdiction over PP&L's petition. The October 16 PUC Order is relevant to SER's argument that the district court erred in staying SER's antitrust claims pending a PUC resolution of certain substantive issues on the basis that the PUC has no jurisdiction to entertain the claims, and because it is unfair to stay a case pending an agency determination which, if ever made, will be subject to a lengthy appeal. (Brief of Appellant, pp. 35-50; Reply Brief of Appellant.)

Respectfully submitted,

CAPLAN & LUBER .

By: /s/ Mary Huwaldt
Mary Huwaldt, Esquire

MHmch
#1236-004
Enclosures
cc: John Rich (w/encl)
Glen R. Stuart, Esquire (w/encl)

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 95-CIV-4885
JURY DEMANDED

SCHUYLKILL ENERGY RESOURCES, INC.
Plaintiff,

v.

PENNSYLVANIA POWER & LIGHT COMPANY,
Defendant.

[stamp—FILE APR 22 1996]

TO THE CLERK:

Kindly docket the attached letter brief in the above captioned matter.

Respectfully submitted,

/s/ Mary J. Huwaldt
Richard L. Caplan, Esquire
Mary J. Huwaldt, Esquire
CAPLAN & LUBER
40 Darby Road
Paoli, PA 19301-1461
(610) 640-1200

Attorneys for Plaintiff
Schuylkill Energy Resources, Inc.

CAPLAN & LUBER
40 Darby Road
Paoli, PA 19301
(610) 640-1200
Fax: (610) 640-9865

FAX COVER SHEET

April 19, 1996

TO	FROM
The Honorable Edward N. Cahn	Richard L. Caplan, Esquire Mary Huwaldt, Esquire Caplan & Luber
FAX 776-0347	
FILE NO: 1236-004	PHONE CODE: 0076
SUBJECT	PAGES
SER v. PP&L Case No. 95-CV-4885	11, including this cover sheet.

MESSAGE: Hard copy to follow by regular mail.

This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, copying, or the taking of any action in reliance on the contents of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address via U.S. Postal Service. Thank you.

If you do not receive the total pages as stated, please call our main office number (610) 640-1200 and ask for the operator indicated above. Our fax number is (610) 640-9865.

[Letterhead, CAPLAN & LUBER, omitted in printing]

April 19, 1996

REPLY TO: Paoli
VIA FACSIMILE

The Honorable Edward N. Cahn
501 Hamilton Street
Allentown, PA 18101

Re: Schuylkill Energy Resources, Inc. v.
Pennsylvania Power & Light Company
Case No. 95-CV-4885

Dear Judge Cahn:

Schuylkill Energy Resources, Inc. ("SER") respectfully submits this letter brief in response to your directive, at the conclusion of oral argument on April 15, 1996, that plaintiff articulate any factual issues implicated by the two antitrust counts of its amended complaint (the "Complaint") which would preclude Your Honor from dismissing those counts in response to defendant's Rule 12(b)(6) motion. It is SER's understanding, based on Your Honor's comments during the oral argument, that, should you agree that any of theses issues is *bona fide*, you will afford the parties limited discovery to flesh them out. However, SER believes that, as a practical matter, the inherent complexity of the factual inquiries, which may ultimately determine the legal sufficiency of the Complaint, precludes the imposition of rational discovery boundaries. Therefore, SER would encourage the court to allow discovery to proceed on an unfettered basis.

Given that the court is required, for purposes of testing the legal sufficiency of a complaint, to accept as true all well pleaded factual allegations and all reasonable inferences favorable to the plaintiff which may be drawn from them. *Wisniewski v. John-Manville Corporation*, 759 F.2d 271 (3d Cir. 1985), SER's task is to identify those disputed facts,

not on the face of the Complaint, upon which Pennsylvania Power & Light Company ("PP&L") relies to support its dismissal arguments, whether expressly or by implication.

SER has structured its presentation to address each of PP&L's contentions as they relate to Counts I and II. Count I states a Sherman Act § 2 claim for monopolization. Count II states a Sherman Act § 2 claim for attempt to monopolize.

PP&L has failed, in its briefs, its oral argument and its recitation of the law, to distinguish between the claim of actual monopolization and the claim of attempted monopolization. PP&L would have the court dismiss both of these counts generically on grounds that:

1) SER is not PP&L's competitor as a wholesale or retail supplier of electricity;

2) SER has failed to demonstrate antitrust injury; and

3) PP&L's conduct is immune from antitrust scrutiny under the state action doctrine.

Each of PP&L's arguments is buttressed by alleged facts not of record. Therefore, dismissal of SER's Complaint prior to discovery would be legally inappropriate and untenable on appeal.

A. SHERMAN ACT,§ 2, ATTEMPTED MONOPOLIZATION (COUNT II)

SER alleges in its Complaint that PP&L has illegally wielded its monopoly power in an attempt to prevent SER from competing with it in the sale of electric power at wholesale and effectively at retail within the relevant geographic market, which is defined by PP&L's service area. Complaint, ¶¶ 16, 17, 23-25, 27, 37, 68-69, 72, 74. Count II supports the inference that, absent the illegal exercise of PP&L's monopoly power, SER could and would ultimately

compete directly with PP&L for the sale of wholesale power to resellers (such as municipal utilities) and may in the future service individual consumers in a deregulated market. Upon expiration of its power purchase agreement with PP&L and the retirement of the Plant's construction debt, SER will be able to sell all of its net energy to resellers or to individual consumers at prices well below its current rates (which include debt service). SER has alleged that PP&L's illegal conduct, by tending to economically disadvantage and ultimately threatening to force SER out of the relevant market, will prevent the realization of these predictable competitive eventualities. Complaint, ¶¶ 68-69, 72, 74.[1]

PP&L claims that SER has failed to allege "antitrust injury," that SER is not *currently* a competitor of PP&L, and that both of these purported deficiencies support dismissal of SER's § 2 claims. PP&L's position is predicated upon a misapprehension of the law. Both the United States Supreme Court and the Third Circuit have held that a plaintiff need not be a *current* competitor of an antitrust defendant to maintain a Sherman Act § 2 attempted monopolization claim. Neither the Supreme Court nor the Third Circuit requires that a plaintiff plead or prove "antitrust injury" for an attempted monopolization claim. Indeed, PP&L's argument that SER's *entire* antitrust case should be dismissed, for want of a showing of recognized "antitrust injury" relies *only* on Sherman Act § 1 and Clayton Act cases. PP&L fails to cite a single § 2 case in support of its position.

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[1] SER believes that all of these inferences are implicit in the language of its Complaint, as well as the suggestion that PP&L's predatory conduct will have a chilling effect upon the future entry into the relevant market of potential new electricity generation competitors to PP&L. Should the court decide that these assertions or others discussed in this letter must be expressly pled, SER asks the court to consider this letter as a request to amend the Complaint appropriately.

To require accomplished "antitrust injury" in an *attempt* case would contravene the third element of an attempt to monopolize cause of action, which requires only a showing of "a dangerous probability of achieving monopoly power" and which clearly precludes conduct which threatens to forestall potential *future* competition. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (citing *Areeda & Turner, supra*, at ¶ 820, p. 312). The "[u]se of monopoly power 'to destroy threatened competition is a violation of the 'attempt to monopolize clause of § 2 of the Sherman Act." *Otter Tail Power Company v. United States*, 410 U.S. 366, 377 (1973) (citing *Lorain Journal v. United States*, 342 U.S. 143, 154 (1951); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1992)).

Attempted monopolization has been discussed as follows:

> [M]onopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. . . . Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. It is indeed 'unreasonable, per se, to foreclose competitors from any substantial market.' *The anti-trust laws are as much violated by the prevention of competition as by its destruction.*

U.S. v. Griffith, 334 U.S. 100, 106-107 (1948) (footnotes and citations omitted, emphasis supplied).

Therefore, the legal sufficiency of Count II of the Complaint does not depend upon any assertion that SER is a *current* competitor of PP&L or that consumers and/or competition have already suffered antitrust injury. Rather, "a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific

intent to monopolize and (3) a dangerous probability of achieving monopoly power. See Areeda & Turner, *supra*, at ¶ 820, p. 312." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). *Spectrum Sports, Inc.*, as well as *Griffith*, confirms that SER need not show that it currently competes with PP&L or that competition has already been injured to support its attempt claim.

Count II of SER's Complaint alleges the essential requirements of a § 2 attempted monopoly claim. SER has alleged that PP&L engaged in predatory conduct by illegally refusing to accept power from SER, even when contractually required to do so, and by purposefully evading its contractual and regulatory obligations to accept power by fabricating minimum generation circumstanes ("MINGENs"), as well as illegally misrepresenting the extent and duration of legitimate MINGENs. (Complaint ¶¶ 53, 56, 69-70.) SER has alleged that PP&L's sole intent in pursuing illegal curtailment practices, which had no legitimate business justification under the contract and the existing regulatory framework. Complaint ¶¶ 47, 48, 53, 59, 60, was to destroy SER as a going concern in order to reduce or forestall future competition in the generation of electricity. Complaint ¶¶ 66, 68, 69, 72, 74.

PP&L's predatory conduct threatens to prevent SER from offering electricity for sale at wholesale or retail within the relevant market. SER's sales could consist of current generation in excess of SER's 79.5 megawatt contractually required delivery to PP&L, or the entire net output of the Plant when SER's agreement with PP&L expires. PP&L's illegal strategy would eliminate or severely economically disadvantage SER in order to justify accelerated, future expansion of PP&L's generating capacity, which would allow PP&L to rationalize to the PUC a higher "used and useful" capital base to increase the rates paid in future by its ratepayers and the return to its shareholders. Complaint ¶¶

28, 29, 62-64. PP&L's illegal conduct would also deprive SER of its opportunity to market a superior product, whose environmentally beneficial effects may be more attractive to consumers than PP&L's nuclear-based power generation. (Complaint ¶ 65, 68.)

SER has alleged the dangerous likelihood that PP&L's illegal strategy will succeed in preserving or expanding its existing monopoly within the relevant market, in part as a consequence of its overpowering market share and its ability to exclude competitors by improper implementation of power purchase agreements and its control of the power transmission grid. (Complaint ¶¶ 17, 27). PP&L has yet to demonstrate, because it cannot, that these elements fail to sustain a legally viable *attempted* monopolization claim.

The courts have consistently held that only in the rarest of circumstances may an attempt to monopolize claim be properly dismissed on the face of the complaint. In *Spectrum Sports, supra*, the Supreme Court held that, in order to determine whether defendant had a dangerous probability of achieving monopoly power, the court must consider the relevant market and the defendant's ability to lessen or destroy competition in that market. 506 U.S. at 456. In *Pastore v. Bell Telephone Company*, 24 F.3d 508 (3d Cir. 1994), the Third Circuit agreed that whether a dangerous probability of achieving monopoly power existed required an inquiry into the relevant product and geographic markets and defendant's economic power in these markets. *Id.* at 512. The Court held that "[t]here is no simple formula" for determining whether defendant possesses "significant market power" which would allow it to come dangerously close to success in its predatory scheme, and that "factors to be reviewed 'include the strength of the competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of

consumer demand.' " *Id.* at 513 (quoting *Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98, 112 (3d Cir. 1992)).

Overwhelming evidence of an intent to monopolize or of overtly predatory conduct can diminish the significance of the relevant market share. *Id.* at 514. Evidence of intent, as inferred from the egregious nature of predatory conduct or otherwise, can be overwhelmingly persuasive in resolving an attempt to monopolize claim. In *Bracer v. Allegheny General Hospital*, 64 F.3d 3d 369 (3d Cir. 1995), the Third Circuit refused to affirm the trial court's dismissal of a § 2 attempt complaint on grounds that the plaintiff had failed to adequately allege a dangerous probability of acquiring monopoly power. The Third Circuit held that the question of whether there was a dangerous probability of achieving monopoly power in the relevant matter "is typically one that is not resolved at the pleading stage unless it is clear on the face of the complaint that the 'dangerous probability' standard cannot be met is a matter of law . . . ." *Id.* at 877.

Thus, there exist myriad factual issues which preclude dismissal of SER's complaint at this stage. They include:

1. PP&L's share of the relevant market, as determined by, *inter alia*, the strength of the competition, probably development of the industry, barriers to entry, nature of the anti-competitive conduct, and elasticity of consumer demand.

2. SER's ability, now and in the future, to compete against PP&L, as determined by *inter alia*, availability for sale of excess power generated by SER above 79.5 MW; current wholesale prices; identity of potential customers; prices at which SER could sell its excess power; likely wholesale market prices at the expiration of the power purchase agreement; and probability of deregulation of the wholesale and retail power market in the foreseeable future.

B. SHERMAN ACT, § 2, ACTUAL MONOPOLIZATION

COUNT I

1. *SER Competes with PP&L*

The offense of actual monopolization (as opposed to attempted monopolization) under § 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." *United States v. Grinnell Corp.*, 385 U.S. 563, 570-571 (1966). Monopoly power is defined as the power to control prices or to exclude competition, the latter of primary relevance here. *Id.* at 570. The existence of monopoly power can be inferred from a defendant's predominant share of the market and depends also on the existence of barriers to entry (all of which have been pled by SER in its Complaint). *Id.* Where the existence of monopoly power cannot be inferred as a matter of law from the defendant's share of the relevant market, it is a fact question to be determined upon presentation of evidence. *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 480 (1992). The "proper market definition" can be determined "only after a factual inquiry into the 'commercial realities' faced by consumers." *Id.* at 482.

The second element of a § 2 actual monopolization claim, i.e., whether the defendant used its monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor," also requires the evaluation of factual issues. *Eastman Kodak, supra*, 504 U.S. at 483. A firm can refuse to deal with its competitors only "if there are legitimate competitive reasons for the refusal." *Id.* In order to evaluate the merits of SER's § 2 monopoly claim, this Court must examine the factual circumstances surrounding PP&L's curtailments, including whether those curtailments

were based on fabricated, exaggerated or otherwise misleading claims of "MINGENs," the extent to which PP&L had knowledge of and participation in the development of self serving PJM (power pool) curtailment policies and practices, the motivation behind PP&L's own curtailment policy, including whether it was intended to put economic pressure on the independent power producers, PP&L's actual implementation of its curtailment policy, PP&L's interest in and desire to expand its capital facilities at the expense of independent power producers, and other relevant matters too numerous to elaborate. As the Court in *Eastman Kodak* stated, "[f]actual questions exist . . . about the validity and sufficiency of each claimed justification, making summary judgment inappropriate." *Id.* at 483. Where summary judgment is inappropriate, dismissal on the pleadings is clearly unavailable.

PP&L argues that the § 2 actual monopolization claim cannot be sustained because SER is not its competitor as a supplier of electricity, whether on the retail or wholesale level. There are no facts, however, on the face of the Complaint or principles articulated in the cases cited by PP&L which demand this conclusion as a matter of law. Contrary to PP&L's representation at oral argument, the Complaint does *not* state that SER is legally obligated to sell *all* of its net generation of electricity to PP&L. Rather, SER need only deliver to PP&L its "entire net power output *up to* 79.5 megawatts." (Emphasis supplied.) Complaint, ¶ 22. Therefore, even if this court were to conclude that SER is not a competitive supplier of electricity at retail, i.e., to PP&L's rate paying consumers, a fact question exists as to whether SER has excess generating capacity which it could market at wholesale through wheeling, as permitted by PURPA and its implementing regulations, or via private transmission lines. 16 U.S.C. § 824a-3(a); 16 U.S.C. § 824j(a); *Drexelbrook Associates v. Pennsylvania Public Utility Commission*, 418 Pa. 430, 212 A.2d 237 (1965).

PP&L's argument, which misstates SER's actual generation capacity, is belied by ¶ 5 of the Complaint which alleges the Plant's commercially available output to be greater than 79.5 megawatts.[2]

PP&L's claim that SER is not its competitor in providing electricity to consumers within its service territory is also refuted by the allegation of the Complaint, which the court is bound to accept as true at this time, that the regulatory imposed Energy Cost Rate ("ECR") mechanism ensures that PP&L makes no profit and sustains no loss as a consequence of its acquisition of electricity from SER, which it then distributes to its consumers. Complaint, ¶¶ 23-24. Therefore, there are ample factual grounds for the court to credit SER's claim that, because consumers pay for SER's power dollar for dollar, SER is effectively a "seller" to them at retail in direct competition with PP&L at least for purposes of the antitrust laws. *See Lehigh Valley Power Committee v. Pennsylvania Public Utility Commission*, 128 Pa. Commw. 259, 276 n. 10, 563 A.2d 548 (1989) ("utilities earn no return on costs, such as those incurred to purchase fuel or power from other sources such as QFs . . . [QF] generation is clearly in competition with the utilities and displaces generation and plant that the utility would add to rate base, or power purchases from sister utilities").

PP&L virtually concedes this point by arguing that there is no price competition between PP&L and SER's product because SER is one of PP&L's most expensive suppliers of electricity. However, in the absence of evidence that SER's wholesale price might not be attractive to resellers (such as municipal utilities) presently served by PP&L, PP&L's price argument cannot be sustained without discovery.

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[2] While this fact issue could be resolved through discovery, SER now seeks leave to amend the Complaint to recite the Plant's actual capacity to generate at least 5.5 megawatts, for potential sale to third parties, in excess of the amount which it presently provides by contract to PP&L.

2. *SER Has Adequately Alleged Antitrust Injury*

Count 1 asserts that consumers within PP&L's service area are injured by PP&L's improper curtailments of SER generation in at least three ways, none of which involve current price competition:

A) Illegal curtailments reduce the inherent reliability of electric service in that they tend to preserve PP&L's present level of dependence upon foreign fossil fuels, in direct contravention of the public policy considerations underlying PURPA. Complaint, ¶¶ 10, 15, 66; *West Penn Power Company v. Pennsylvania Public Utility Commission*, Util. L. Rep. P 26, 474, 659 A.2d 1055 (Pa. Cmmwlth. 1995) ("PURPA was enacted as part of the National Energy Act during a time of nationwide energy crisis. . . . to lessen the dependence of electric utilities on foreign oil and on natural gas by encouraging the development of alternative power sources"); *Independent Energy Producers Association v. California Public Utilities Commission*, 36 F.3d 848, 851 (9th Cir. 1994) ("PURPA was enacted to . . . reduce American dependence on fossil fuels by promoting increased energy efficiency").

B) Illegal curtailments, to the extent that they could drive SER out of the market or have a current, chilling effect upon new entrants into the industry, artificially preserve or enhance the size of PP&L's rate base, which has a long term, negative impact upon future consumer base rates. Complaint, ¶¶ 62, 63, 66; *Lehigh Valley Power Committee v. Pennsylvania Public Utility Commission*, 128 Pa. Commw. 259, 276 n. 10, 563 A.2d 548 (1989).

C) Illegal curtailments deprive consumers of the opportunity to acquire environmentally pro-active energy produced through the consumption of unsightly and toxic waste and for which, as a matter of factual discovery, they may well be willing to pay more. Complaint ¶¶ 7, 66.

Because the law does not categorically precludes these forms of antitrust injury, *Aspen Skiing Company v. Aspen Highlands Skiing Corporation*, 471 U.S. 585 (1985), the court must evaluate the impact of each of these non-price injuries to the competitive process, which necessarily involves material fact issues beyond the Complaint.

The Ninth Circuit has found that the value of electric energy provided to a utility by a QF pursuant to PURPA and relevant implementing regulations cannot be determined by price alone. That court held that "the value of electric energy provided by the QF varies depending on the terms of its commitment to the utility, the length of time during which the QF has guaranteed that it will supply electric energy to the utility, the certainty and dependability of the supply, and the existence in the contract of penalty provisions for the breach of any contractual obligations." *Independent Energy*, 36 F.3d at 856-857.[3] Thus, PP&L's naive and overly simplistic emphasis upon the nominal price today of QF energy provides virtually no guidance to this Court concerning the *value* of that energy, both to the utility and to the ultimate consumer, and cannot be used in any principled way to defeat SER's antitrust claims.

A determination of the impact upon ultimate electric service reliability, of illegal curtailments of generation derived from domestic, waste fuel sources, would require

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[3] Not only does PP&L's attempt to rely on nominal price fail to take into consideration the valuation factors articulated in *Independent Energy*, but it also fails to consider the factors included in PP&L's avoided cost, as compared to the factors included in SER's price. Any rational look at these numbers reveals that comparing them is comparing apples and oranges, and ignores a host of benefits that PP&L can receive as a result of acquiring its power through an independent power producer instead of producing it itself. None of these issues can be meaningfully evaluated without discovery.

discovery of the extent of PP&L's actual use of foreign fuels and the extent that this use is fostered by PP&L's deferential policy favoring generation by its own units in alleged MINGENs at the expense of QFs. Validation of the second market injury, the ultimate impact upon consumers of PP&L's effort to sustain its existing rate base as "used and useful" by undermining the viability of QF capacity, requires a factual assessment of the extent to which such capacity threatens shrinkage of the rate base or impedes its expansion and commensurate increase in rates. Validation of the third market injury would require an assessment of the ratepayers' willingness to pay more for environmentally proactive power, as they already appear willing in large numbers to do for so-called "green" products of other kinds.

In order to evaluate SER's competition with PP&L, this court would also be required to evaluate (1) the chilling impact that PP&L's conduct has on potential third party entrants into the electric generation business (as evidence of its intent and ability to foreclose competition); (2) the extent of the projected rate of future curtailments, because it bears directly on PP&L's ability to destroy SER, (3) the extent to which PP&L's ability to drive SER out of the market would deprive the market of a wholesale competitor that could undersell PP&L (requiring an analysis of whether the rate set forth in the power purchase agreement fully satisfies SER's operational and debt services expenses, making it possible for SER to sell its generating capacity in excess of 79.5 megawatts at a very low price), and (4) the impact of the loss of opportunity for wholesale purchasers to buy SER's excess generation because its could be cheaper than PP&L power or because of its environment benefits.

C. PP&L's Challenged Conduct Is Not Subject to State Action Immunity

The judicially noticeable facts of record establish that in Pennsylvania there has been insufficient *active* state supervision of public utility generation curtailment policies in alleged MINGENs to support state action immunity.[4] Specifically, those facts reveal that, until the regulatory proceeding initiated by PP&L after the commencement of this antitrust suit, the PUC has never been asked to, nor has it ever, at its own initiative, determined the propriety of any regulated utility's response to alleged MINGENS. Neither the PUC nor any other responsible government agency has ever required a regulated utility to report the occurrence of MINGENS. The PUC has never issued an order relevant to minimum generation policies and procedures.

The lack of actual state supervision is evidenced by PUC's acknowledgement, in its pleadings on file with the PUC, that it never sought or obtained PUC approval or review when it substantially charged its curtailment practices in or about the summer of 1994. (PP&L Petition to PUC, Docket No. P-950995, p. 13, n. 6.) In the event the court is reluctant to judicially notice the lack of actual active state supervision, this issue is ripe for discovery.

The first prong of the *Midcal* test requires a showing that a comprehensive state regulatory scheme evidences, on its face, an intent to displace competition. In this case,

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[4] The United States Supreme Court has established a "two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws." *Patrick v. Burger*, 486 U.S. 94, 99 (1983). First, the challenged conduct must be "clearly articulated and affirmatively expressed as state policy" designed to displace competition. *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.* 445 U.S. 97 (1980). Second, the conduct must be "actively supervised" by the state itself. *Id.*

however, the state regulatory scheme at issue (the Pennsylvania regulations which implement PURPA, 52 Pa. Code §§ 57.31. *et seq.*, as amended on December 30, 1995), expresses on its face an intent to promote rather than displace competition by implementing a competitive bidding system for the acquisition of energy and capacity by public electric utilities. 52 Pa. Code § 57.34(c) Moreover, the only PUC regulation extant prior to 1995, that arguably related to the curtailment of purchases of power by regulated utilities from qualifying facilities such as SER, is deleted by the December 30, 1995 amendments. 52 Pa. Code § 57.34(b) The PURPA regulatory scheme, as it existed prior to December of 1995, has repeatedly been recognized as evidencing an intent and an effect of promoting competition. *See West Penn Power Company v. Pennsylvania Public Utility Commission*, Util. L. Rep. P 26,474, 659 A.2d 1055, 1059 (Pa. Cmmwlth. 1995) (''PURPA had the unintended consequence of promoting competition in the electric industry in that non-utility, independent power producers are entering the market to supply electric power both to utilities and to large customers''); *Freehold Cogeneration Associates v. Board of Regulatory Commissioners of New Jersey*, 44 F.3d 1178, 1183 (3d Cir. 1995) (''[i]n enacting PURPA, Congress sought to overcome traditional electric utilities' reluctance to purchase power from nontraditional electric generation facilities''); *Lehigh Valley Power Committee v. Pennsylvania Public Utility Commission*, 128 Pa. Commw. 259, 276 n. 10, 563 A.2d 548 (1989) (''[t]he enactment of PURPA flowed from the awareness that utilities are hostile to non-utility generation since such generation is clearly in competition with the utilities and displaces generation plant the utility would add to rate base, or power purchases from sister utilities'').

Antitrust immunity based on state action should be granted sparingly. In *American Agriculture Movement v. Board of Trade of Chicago*, 977 F.2d 1147 (7th Cir. 1992),

the court recognized that the circumstances under which "reconciling antitrust law with a regulatory regime . . . compels the conclusion that the regulatory regime has impliedly granted antitrust immunity to private parties operating under its rubric . . . are rare." *Id.* at 1158. The court held that "[t]he failure of an agency to take formal action 'simply cannot be equated with an informed administrative judgment' and therefore 'cannot strengthen the argument for judicial abstention.' " *Id.* at 1163 (quoting Areeda & Turner, *Antitrust Law*, P 224, at 152 (1978)). Where "the decision was 'governed in the first instance by business judgment and not regulatory coercion,' " there could be no antitrust immunity. *Id.* at 1163. Here, indisputably, PP&L's decision to revise its curtailment policies in the summer of 1994, without ever presenting that plan to the PUC for approval, was governed in the first instance by business judgment and cannot be viewed as the product of regulatory coercion. For all of these reasons, state action immunity is unavailable to PP&L.

In light of the myriad fact issues bearing upon the sufficiency of the Complaint and the inherent strength of the Sherman Act claims, dismissal at this state is unwarranted. The stay should be lifted and discovery allowed to proceed.

Respectfully yours,
CAPLAN & LUBER

By: /s/ Richard L. Caplan
Richard L. Caplan, Esquire

RLC/dmf
cc: Glen Stuart, Esquire (via Federal Express)

APPENDIX G

PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 66. PUBLIC UTILITIES
PART I. PUBLIC UTILITY CODE
SUBPART D. SPECIAL PROVISIONS RELATING TO REGULATION OF PUBLIC UTILITIES
CHAPTER 28. RESTRUCTURING OF ELECTRIC UTILITY INDUSTRY

§ 2801. Short title of chapter

This chapter shall be known and may be cited as the Electricity Generation Customer Choice and Competition Act.

§ 2802. Declaration of policy

The General Assembly finds and declares as follows:

(1) Over the past 20 years, the Federal Government and State government have introduced competition in several industries that previously had been regulated as natural monopolies.

(2) Many state governments are implementing or studying policies that would create a competitive market for the generation of electricity.

(3) Because of advances in electric generation technology and Federal initiatives to encourage greater competition in the wholesale electric market, it is now in the public interest to permit retail customers to obtain direct access to a competitive generation market as long as safe and affordable transmission and distribution service is available at levels of reliability that are currently enjoyed by the citizens and businesses of this Commonwealth.

(4) Rates for electricity in this Commonwealth are on average higher than the national average, and significant differences exist among the rates of Pennsylvania electric utilities.

(5) Competitive market forces are more effective than economic regulation in controlling the cost of generating electricity.

(6) The cost of electricity is an important factor in decisions made by businesses concerning locating, expanding and retaining facilities in this Commonwealth.

(7) This Commonwealth must begin the transition from regulation to greater competition in the electricity generation market to benefit all classes of customers and to protect this Commonwealth's ability to compete in the national and international marketplace for industry and jobs.

(8) In moving toward greater competition in the electricity generation market, the Commonwealth must resolve certain transitional issues in a manner that is fair to customers, electric utilities, investors, the employees of electric utilities, local communities, nonutility generators of electricity and other affected parties.

(9) Electric service is essential to the health and well-being of residents, to public safety and to orderly economic development, and electric service should be available to all customers on reasonable terms and conditions.

(10) The Commonwealth must, at a minimum, continue the protections, policies and services that now assist customers who are low-income to afford electric service.

(11) In order to ensure the safety and reliability of the electric system, ensure the continued provision of high-quality customer service and avoid economic dislocation, utilities

shall consider the experience and expertise of their work force in moving towards competition.

(12) The purpose of this chapter is to modify existing legislation and regulations and to establish standards and procedures in order to create direct access by retail customers to the competitive market for the generation of electricity while maintaining the safety and reliability of the electric system for all parties. Reliable electric service is of the utmost importance to the health, safety and welfare of the citizens of the Commonwealth. Electric industry restructuring should ensure the reliability of the interconnected electric system by maintaining the efficiency of the transmission and distribution system.

(13) Under current law and regulation there exists some competition in the wholesale market for the generation of electricity, but the generation, transmission, distribution and retail sale of electricity is provided generally by public utilities under bundled rates regulated by the commission. The procedures established under this chapter provide for a fair and orderly transition from the current regulated structure to a structure under which retail customers will have direct access to a competitive market for the generation and sale or purchase of electricity.

(14) This chapter requires electric utilities to unbundle their rates and services and to provide open access over their transmission and distribution systems to allow competitive suppliers to generate and sell electricity directly to consumers in this Commonwealth. The generation of electricity will no longer be regulated as a public utility function except as otherwise provided for in this chapter. Electric generation suppliers will be required to obtain licenses, demonstrate financial responsibility and comply with such other

requirements concerning service as the commission deems necessary for the protection of the public.

(15) In establishing the standards for the transition to and creation of a competitive electric market, heretofore, public utilities generally have had an obligation to serve customers within their defined service territories; consistent with that obligation, have undertaken long-term investments in generation, transmission and distribution facilities in order to meet the needs of their customers; and have entered into long-term power supply agreements as required by Federal law. In many instances, these investments and agreements have created costs which may not be recoverable in a competitive market. The commission is empowered under this chapter to determine the level of transition or stranded costs for each electric utility and to provide a mechanism, the competitive transition charge, for recovery of an appropriate amount of such costs in accordance with the standards established in this chapter.

(16) It is in the public interest for the transmission and distribution of electricity to continue to be regulated as a natural monopoly subject to the jurisdiction and active supervision of the commission. Electric distribution companies should continue to be the provider of last resort in order to ensure the availability of universal electric service in this Commonwealth unless another provider of last resort is approved by the commission.

(17) There are certain public purpose costs, including programs for low- income assistance, energy conservation and others, which have been implemented and supported by public utilities' bundled rates. The public purpose is to be promoted by continuing universal service and energy conservation policies, protections and services, and full

recovery of such costs is to be permitted through a nonbypassable rate mechanism.

(18) There are certain changes to a utility which will create transition costs to accomplish the move to a competitive market. These changes may entail the closure of facilities or reduction in employee levels. If such actions are to be undertaken, the utility must fully inform the commission of the impact of such decisions on local communities and on social services and of any tax implications of the actions. The utility is expected to discuss the transition to competition with its employees or their certified representatives and may provide severance, retraining, early retirement and outplacement services. Such transition costs may be recoverable under the competitive transition charge in section 2808 (relating to competitive transition charge).

(19) All participants in the restructured electric industry are encouraged to coordinate their plans and transactions through an independent system operator or its functional equivalent.

(20) Since continuing and ensuring the reliability of electric service depends on adequate generation and on conscientious inspection and maintenance of transmission and distribution systems, the independent system operator or its functional equivalent should set, and the commission shall set through regulations, inspection, maintenance, repair and replacement standards and enforce those standards.

(21) Under Federal and State clean air laws and regulations, electricity generators located in states to the west and south of this Commonwealth are not subject to requirements as stringent as those which apply to generators and other "persons" as defined in section 3 of the act of January 8, 1960 (1959 P.L. 2119, No. 787), [FN1] known as

the Air Pollution Control Act, operating in this Commonwealth and that different regions within this Commonwealth are subject to varying air emission requirements. Under some scenarios, competition among electricity generators located in different states and different regions within this Commonwealth could make it more difficult for areas in this Commonwealth to demonstrate attainment with Federal and State air quality standards. Since this result may be caused by the disparate requirements imposed by Federal and State law on generators and other "persons" as defined in section 3 of the Air Pollution Control Act in this Commonwealth and generators located in other states, the General Assembly supports changes to Federal clean air laws and regulations that will protect Pennsylvania's environment and ensure that electricity generators and other "persons" as defined in section 3 of the Air Pollution Control Act located in this Commonwealth are not placed at an undue competitive disadvantage. The commission will consult with the Department of Environmental Protection regarding this issue during the transition to retail competition.

§ 2803. Definitions

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Aggregator" or "market aggregator." An entity, licensed by the commission, that purchases electric energy and takes title to electric energy as an intermediary for sale to retail customers.

"Broker" or "marketer." An entity, licensed by the commission, that acts as an agent or intermediary in the sale and purchase of electric energy but that does not take title to electric energy.

"Competitive transition charge." A nonbypassable charge applied to the bill of every customer accessing the transmission or distribution network which (charge) is designed to recover an electric utility's transition or stranded costs as determined by the commission under sections 2804 (relating to standards for restructuring of electric industry) and 2808 (relating to competitive transition charge).

"Consumer." A retail electric customer.

"Customer." A retail electric customer.

"Direct access." The right of electric generation suppliers and end-use customers to utilize and interconnect with the electric transmission and distribution system on a nondiscriminatory basis at rates, terms and conditions of service comparable to the transmission and distribution companies' own use of the system to transport electricity from any generator of electricity to any end-use customer.

"Electric distribution company." The public utility providing facilities for the jurisdictional transmission and distribution of electricity to retail customers, except building or facility owners/operators that manage the internal distribution system serving such building or facility and that supply electric power and other related electric power services to occupants of the building or facility.

"Electric generation supplier" or "electricity supplier." A person or corporation, including municipal corporations which choose to provide service outside their municipal limits except to the extent provided prior to the effective date of this chapter, brokers and marketers, aggregators or any other entities, that sells to end-use customers electricity or related services utilizing the jurisdictional transmission or distribution facilities of an electric distribution company or that purchases, brokers, arranges or markets electricity or related services for

sale to end-use customers utilizing the jurisdictional transmission and distribution facilities of an electric distribution company. The term excludes building or facility owner/operators that manage the internal distribution system serving such building or facility and that supply electric power and other related power services to occupants of the building or facility. The term excludes electric cooperative corporations except as provided in 15 Pa.C.S. Ch. 74 (relating to generation choice for customers of electric cooperatives).

"End-use customer." A retail electric customer.

"Reliability." Includes adequacy and security. As used in this definition, "adequacy" means the provision of sufficient generation, transmission and distribution capacity so as to supply the aggregate electric power and energy requirements of consumers, taking into account scheduled and unscheduled outages of system facilities; and "security" means designing, maintaining and operating a system so that it can handle emergencies safely while continuing to operate.

"Renewable resource." Includes technologies such as solar photovoltaic energy, solar thermal energy, wind power, low-head hydropower, geothermal energy, landfill and mine-based methane gas, energy from waste and sustainable biomass energy.

"Retail customer." A retail electric customer.

"Retail electric customer." A direct purchaser of electric power. The term excludes an occupant of a building or facility where the owners/operators manage the internal distribution system serving such building or facility and supply electric power and other related power services to occupants of the building or facility; where such

owners/operators are direct purchasers of electric power; and where the occupants are not direct purchasers.

"Transition or stranded costs." An electric utility's known and measurable net electric generation-related costs, determined on a net present value basis over the life of the asset or liability as part of its restructuring plan, which traditionally would be recoverable under a regulated environment but which may not be recoverable in a competitive electric generation market and which the commission determines will remain following mitigation by the electric utility. This term includes:

(1) Regulatory assets and other deferred charges typically recoverable under current regulatory practice, the unfunded portion of the utility's projected nuclear generating plant decommissioning costs and cost obligations under contracts with nonutility generating projects which have received a commission order, the recoverability of which shall be determined under section 2808(c)(1) (relating to competitive transition charge).

(2) Prudently incurred costs related to cancellation, buyout, buydown or renegotiation of nonutility generating projects consistent with section 527 (relating to cogeneration rules and regulations), the recoverability of which shall be determined pursuant to section 2808(c)(2).

(3) The following costs, the recoverability of which shall be determined pursuant to section 2808(c)(3):

(i) Net plant investments and costs attributable to the utility's existing generation plants and facilities.

(ii) The utility's disposal of spent nuclear fuel.

(iii) The utility's long-term purchase power commitments other than the costs defined in paragraphs (1) and (2).

(iv) Retirement costs attributable to the utility's existing generating plants other than the costs defined in paragraph (1).

(v) Other transition costs of the utility, including costs of employee severance, retraining, early retirement, outplacement and related expenses, at reasonable levels, for employees who are affected by changes that occur as a result of the restructuring of the electric industry occasioned by this chapter.

The term includes any costs attributable to physical plants no longer used and useful because of the transition to retail competition. The term excludes any amounts previously disallowed by the commission as imprudently incurred. To the extent that the recoverability of amounts that are sought to be included as transition or stranded costs are subject to appellate review as of the time of the commission determination, any determination to include such costs shall be reversed to the extent required by the results of that appellate review.

"Transmission and distribution costs." All costs directly or indirectly incurred to provide transmission and distribution services to retail electric customers. This includes the return of and return on facilities and other capital investments necessary to provide transmission and distribution services and associated operating expenses, including applicable taxes.

"Universal service and energy conservation." Policies, protections and services that help low-income customers to maintain electric service. The term includes customer assistance programs, termination of service protection and

policies and services that help low-income customers to reduce or manage energy consumption in a cost-effective manner, such as the low-income usage reduction programs, application of renewable resources and consumer education.

§ 2806. Implementation, pilot programs and performance-based rates

(a) General rule.--The generation of electricity shall no longer be regulated as a public utility service or function except as otherwise provided for in this chapter at the conclusion of a transition and phase-in period beginning on the effective date of this chapter and ending, consistent with the commission's discretion under this section, January 1, 2001. As of January 1, 2001, consistent with the commission's discretion under this section, all customers of electric distribution companies in this Commonwealth shall have the opportunity to purchase electricity from their choice of electric generation suppliers. The ultimate choice of the electric generation supplier is to rest with the consumer.

(b) Schedule.--Recognizing that approximately 5% of the peak load will have retail access through pilot programs, the following schedule for phased implementation of retail access shall be adhered to unless a determination is made by the commission under subsection (c):

(1) As of January 1, 1999, a maximum of 33% of the peak load of each customer class shall have the opportunity for direct access.

(2) As of January 1, 2000, a maximum of 66% of the peak load of each customer class shall have the opportunity for direct access.

(3) As of January 1, 2001, all customers of electric distribution companies in this Commonwealth shall have the opportunity for direct access.

(4) The commission shall establish regulations specifying that, within each customer class, the customers that are eligible for direct access prior to full direct access shall be determined on a first-come-first-served basis unless otherwise determined by the commission through regulation, in the context of restructuring plans, or in other appropriate administrative proceedings, to prevent competitive disadvantages among similarly situated customers within a customer class.

(c) Additional time.--

(1) The commission may determine that an additional six-month transition period is necessary prior to the January 1, 1999, implementation date. A determination under this subsection must be made at least 45 days in advance of the scheduled date for implementation and must be based on one or more of the following considerations:

(i) Implementation would materially affect the reliability of the electric system.

(ii) Federal approvals necessary for the implementation of the provisions of this chapter have not been granted.

(iii) Communications and information systems necessary for the implementation of retail access have not been installed for reasons beyond the utility's control, as measured by appropriate industry standards.

(iv) Pennsylvania generators would be disadvantaged due to lack of regional reciprocity with respect to direct access.

(v) The interests of Pennsylvania consumers and the competitive position of Pennsylvania business and industry would be materially affected.

(vi) Such other consideration as would materially affect the orderly implementation of the legislative purpose of this chapter under section 2802(12) through (21) (relating to declaration of policy).

(2) Consistent with the considerations listed in paragraph (1), the commission may determine that an additional six-month transition period is necessary. This determination must be made by the commission by May 15, 1999.

(d) Filing of restructuring plans.--All electric utilities in this Commonwealth shall submit to the commission, pursuant to a schedule to be determined by the commission in consultation with the electric utilities, beginning on April 1, 1997, but in no event later than September 30, 1997, a restructuring plan to implement direct access to a competitive market for the generation of electricity.

(e) Contents of restructuring plans.--A restructuring plan under subsection (d) must include, consistent with the determinations of the commission, unbundled prices or rates for generation, jurisdictional transmission, distribution and other services; a proposed competitive transition charge; a proposed universal service and energy conservation cost-recovery mechanism; procedures for ensuring direct access to all licensed electric generation suppliers; a discussion of the impacts of the proposed plan on the utility's

employees; and revised tariffs and rate schedules implementing the above.

(f) Commission review.--The commission shall review the restructuring plan filed by each electric utility and shall, after open evidentiary hearings with proper notice and opportunity for all parties to cross-examine witnesses, issue an order accepting, modifying or rejecting such plan at the earliest date possible, but no later than nine months from the filing of such restructuring plan. If the commission rejects a restructuring plan, it shall state the specific reasons for rejection and direct the electric utility to file an alternative plan addressing these objections within 30 days of the entry date of the commission order rejecting the plan. The commission shall review the alternative plan, solicit comments from interested parties and issue a final order within 45 days of the filing of the revised plan.

(g) Retail access pilot programs.--As of the effective date of this chapter, the commission has authority to order electric utilities to submit proposals for retail access pilot programs to begin April 1, 1997. The commission shall provide guidelines for retail access pilot programs by order.

(1) In order to determine whether all customers classes can benefit from competitive markets, utilities shall tailor proposed retail access pilot programs to accommodate the specific geographic, demographic and socioeconomic characteristics of their customer base. Retail access pilot programs must include an equal opportunity for the broadest practical direct access by all customer classes to electric generation suppliers.

(2) The minimum period of time for a retail access pilot program shall be one year and shall include an evaluation process as directed by the commission.

(3) In order to ensure the safety and reliability of the generation of electricity in this Commonwealth, participation in the retail access pilot programs shall be limited to electricity suppliers subject to commission licensure or certification.

(i) Each participating electricity supplier shall do all of the following:

(A) Certify to the commission that it will pay and in subsequent years has paid the full amount of taxes imposed by Articles II and XI of the act of March 4, 1971 (P.L. 6, No. 2),[1] known as the Tax Reform Code of 1971, and any tax imposed by this chapter.

(B) Provide the commission with the address of the participant's principal office in this Commonwealth or the address of the participant's registered agent in this Commonwealth, the latter being the address at which the participant may be served process.

(C) Agree that it shall be subject to all taxes imposed by the Tax Reform Code of 1971 and any tax imposed by this chapter.

(ii) Failure of an electricity supplier to pay a tax referred to in subparagraph (i) or to otherwise comply with the provisions of this paragraph shall be cause for the commission to revoke the license of the electricity supplier.

(iii) If an electricity supplier, other than an electric distribution company, does not pay the tax

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[1] 72 P.S. § 7201 *et seq.* and 72 P.S. § 8101 *et seq.*

imposed upon gross receipts under section 1101 of the Tax Reform Code of 1971 or this chapter, the electric distribution company to whose retail customer the electricity supplier provided generation service shall remit the unpaid tax, as a tax on the use of electricity in this Commonwealth, to the Department of Revenue and may collect or seek reimbursement of the tax so paid from the electricity provider or any other appropriate party that used the electricity in this Commonwealth. The department shall collect and enforce the use tax herein provided under section 1102 of the Tax Reform Code of 1971. Failure of the electric distribution company to pay the amount within 30 days after notice provided by the department shall cause interest to be imposed on the electric distribution company in accordance with Article XI of the Tax Reform Code of 1971. Interest shall be calculated from the 31st day after the department gives the notice required in this subparagraph. An electric distribution company or other appropriate person may challenge the imposition of the tax and interest by filing a petition with the department not later than 30 days after the date on which the tax became due.

(4) The percentage of utility load committed to a retail access pilot program must be approximately 5% of utility's peak load for each customer class. Waivers of this condition may be considered by the commission for economic development purposes or special circumstances.

(h) Flexible pricing.--In addition to the implicit authority of the commission under section 501 (relating to general powers), the commission has the authority to approve flexible

pricing and flexible rates, including negotiated, contract-based tariffs designed to meet the specific needs of a utility customer and to address competitive alternatives.

(i) Performance-based rates and alternative regulation.--The commission has authority to use performance-based rates as an alternative to existing rate base/rate of return ratemaking, subject to the restrictions pertaining to rate caps in section 2804(4) (relating to standards for restructuring of electric industry).

§ 2808. Competitive transition charge

(a) General rule.--To provide each electric utility with an opportunity to recover its transition or stranded costs following the commission's determination under subsection (c), every customer accessing the transmission or distribution network shall pay a competitive transition charge to the electric distribution company in whose certificated territory that customer is located. The costs to be recovered shall be allocated to customer classes in a manner that does not shift interclass or intraclass costs and maintains consistency with the allocation methodology for utility production plant accepted by the commission in the electric utility's most recent base rate proceeding. If a customer installs on-site generation which operates in parallel with other generation on the public utility's system and which significantly reduces the customer's purchases of electricity through the transmission and distribution network, the customer's fully allocated share of transition or stranded costs shall be recovered from the customer through a competitive transition charge. The recovery of transition or stranded costs associated with existing generating facilities is contingent on continued operation at reasonable availability levels of the generation facilities for which recovery has been approved, except when

the generation facility is uneconomic on a production cost basis because of the transition to a competitive market.

(b) Period for collecting competitive transition charge.--The competitive transition charge shall be included on bills to customers for a period not to exceed nine years from the effective date of this chapter unless an alternative payment methodology is mutually agreed upon by the customer and the utility or unless the commission in its discretion and for good cause shown orders an alternative payment period. In establishing the length of the period for collection of the competitive transition charge, the commission shall consider the effect on the ability of the Commonwealth to compete in attracting industry and jobs, on the financial health of electric utilities and other relevant factors.

(c) Determination of competitive transition charge.--In determining the level of transition or stranded costs that an electric utility may recover through the competitive transition charge, the commission shall apply the following principles:

(1) The commission shall allow recovery of regulatory assets and other deferred charges typically recoverable under current regulatory practice, the unfunded portion of the utility's projected nuclear generating plant decommissioning costs and cost obligations under contracts with nonutility generating projects that have received a commission order. Nothing in this chapter shall be construed as requiring an electric utility or a nonutility generating project to enter into an arrangement to buydown, buyout and terminate or otherwise restructure a contract or as authorizing the commission to require a utility to pursue such an arrangement with a nonutility generating project.

(2) The commission shall allow recovery of an electric utility's prudently incurred costs related to cancellation, buyout, buydown or renegotiation of nonutility generating projects consistent with section 527 (relating to cogeneration rules and regulations).

(3) The commission shall determine the level of other generation-related transition or stranded costs that may be recovered through the competitive transition charge.

(4) The commission shall consider the extent to which the electric utility has undertaken efforts to mitigate generation-related transition or stranded costs by appropriate means in a manner that is reasonable under all of the circumstances, including consideration of whether mitigation has been commensurate with the magnitude of the electric utility's generation-related transition or stranded costs. During the transition period, electric utilities shall have the duty to mitigate generation-related transition or stranded costs to the extent practicable. Efforts may include the following:

(i) Acceleration of depreciation and amortization of existing rate base generation assets.

(ii) Minimization of new capital spending for existing rate base generation assets.

(iii) Reallocation of depreciation reserves to existing rate base generation assets.

(iv) Reduction of book assets by application of new proceeds of any sale of idle or underutilized existing rate base generation assets.

(v) Maximization of market revenues from existing rate base generation assets.

(vi) Issuance of securitized debt pursuant to the provisions of section 2812 (relating to approval of transition bonds).

(5) Of equal importance to the mitigation efforts under paragraph (4), the commission shall consider efforts undertaken over time, prior to the enactment of this chapter, to reduce or moderate customer rate levels while maintaining safe and efficient operations.

(d) Commission review.--As a component of its restructuring plan, each electric utility shall file with the commission a recovery plan, including a proposed competitive transition charge and supporting documentation. In evaluating a recovery plan and any proposed competitive transition charge, the commission shall schedule open evidentiary hearings with proper notice and opportunity for all parties to cross-examine witnesses as necessary.

(e) Use of transition bonds.--After the effective date of this chapter, a utility may apply to the commission for a qualified rate order under section 2812 for some or all of its transition or stranded costs.

(1) In evaluating a utility application under this subsection, the commission shall schedule hearings, as necessary.

(2) If the commission issues a qualified rate order under section 2812 and if the transition bonds approved by that order are successfully issued, then:

(i) The utility shall impose and collect through its customer bills the intangible transition charges approved by that qualified rate order; and

(ii) simultaneously, either the utility's rates for electric service or the utility's competitive transition

charges shall be reduced by an amount equal to the revenue requirement of the transition or stranded costs for which transition bonds have been successfully issued.

(f) Annual revenue.-- Consistent with section 1307(e) (relating to sliding scale of rates; adjustments), the commission shall establish procedures for the annual review of the competitive transition charge. The review shall reconcile the annual revenues received from the charge with the annual amortization of transition or stranded costs approved by the commission under this section. The commission shall adjust the competitive transition charge based upon underrecovery or overrecovery of the annual amortization amount.

APPENDIX H

[Letterhead of CAPLAN & LUBER omitted in printing]

May 14, 1996

Reply to: Paoli

The Honorable Edward N. Cahn
501 Hamilton Street
Allentown, PA 18101

Re: Schuylkill Energy Resources, Inc. v.
Pennsylvania Power & Light Company
Case No. 95-CV-4885

Dear Judge Cahn:

Please accept this letter brief on behalf of Schuylkill Energy Resources, Inc. ("SER") in response to the May 13, 1996 correspondence of defendant Pennsylvania Power & Light Company ("PP&L"). PP&L attempts unsuccessfully to focus attention away from this Court's directive which prompted the letter briefs referred to herein, which was to identify the factual issues which render dismissal of SER's amended complaint inappropriate. PP&L, in its customary fashion (both vituperative and imperious), and in its haste to distill the complex matters before this Court into a single issue of its liking, misses the thrust of SER's argument and in so doing implicitly misstates the law.

SER has alleged in Count II of its amended complaint an attempt to monopolize under § 2 of the Sherman Act. PP&L continues to champion its erroneous position, despite law to the contrary, that SER has failed to allege *current actual* injury to competition, therefore its attempted monopolization claim must fail. PP&L has steadfastly refused to remove its blinders, and ignores relevant authority provided by SER that a successful attempt to monopolize (as opposed to actual monopoliza-

tion) claimant need not prove *current actual* harm to competition in order to prevail.

Perhaps the issue can best be simplified for PP&L's sake by reference to a case referred to in PP&L's own correspondence. In *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980 (5th Cir. 1983), the Fifth Circuit sustained the jury's finding of an attempted monopolization claim. The Court held that the case before it concerned "not an attempt to create monopoly power, but an attempt through illegal means to protect a lawful monopoly against rising competitive challenge." *Id.* at 990. This is the case before this Court, where SER has alleged that PP&L is attempting to protect its monopoly against the rising competitive challenge presented by SER and other independent power producers ("IPPs") in light of pending deregulation of the power market.

The *Multiflex* court emphasized that a significant element of an attempt to monopolize claim is whether the defendant enjoyed a "dangerous probability of success" in its illegal scheme. The court repeatedly held that actual success is not a prerequisite for a finding of dangerous probability of success. "The Sherman Act's prohibition against attempted monopolization does not require that the attempt in fact ripen into an actual monopoly." *Id.* at 92. To the contrary, "[i]t is the attempt which is the offense." *Id.* The Court added that the plaintiff must also satisfy the requirements of § 4 of the Clayton Act, which requires that it "show by a preponderance of the evidence some actual damage to its own business or property that was proximately caused by the antitrust violation." *Id.* at 993. The court held that the attempt at monopolization in the case before it "could well have hindered or delayed the normal growth of the victim's market share" which, along with plaintiff's pecuniary loss associated with the loss of particular jobs, "is

sufficient to establish injury for purposes of § 4 of the Clayton Act." *Id.*

In reaching its conclusion, the Court discussed at length the interplay between "antitrust injury" and an attempt to monopolize claim, ultimately holding that the plaintiff need not show any *current* or *actual* harm to competition in order to prevail on its attempted monopolization claim. The court held:

> [W]e cannot allow treble damages under the Clayton Act unless the injury was the type the antitrust laws were designed to protect. In this respect, charges of attempted monopolization differ from claims of actual monopolization. In the case of actual monopolization, there can be little doubt that the violation injures the marketplace and violates the public policies that the antitrust laws seek to protect. This helps explain, in part, why actual monopolization is an offense even without a showing of specific intent.
>
> Attempted monopolization, on the other hand, does not invariably lead to the type of injury the antitrust laws seek to prevent. The attempt may fail to produce any actual antitrust injury to the marketplace. In this case, for example, the threatened injury to free and open competition never materialized except at most for a brief period. The market quickly beat a path to Multiflex's door in search of the fabled better mousetrap. The "dangerous probability of success" never progressed to success.
>
> The seeming conflict is actually illusory, however. The offense of attempted monopolization need not cause actual market damage, but need merely threaten to produce the type of market damage contemplated in the antitrust laws. The relevant test is whether the "dangerous probability of success," if it had material-

> ized, would have caused the type of market damage the antitrust laws seek to prevent. The mere attempt is the offense.

Id. at 995. The court concluded that the efforts to prevent the plaintiff from entering the competitive marketplace, although ultimately unsuccessful, were nonetheless cognizable as antitrust claims:

> It is therefore almost tautological to find that Moore's intent plus actions with an eye toward monopolization would injure Multiflex, its chief and perhaps only, competitor. Furthermore, it seems clear that these actions interfered with the ultimate customers' free choice in the marketplace and forced them into the position of following the well-trodden path to Moore's doorstep or hewing a treacherous, uphill path to Moore's only competitor. This is the stuff of which antitrust cases are made.

Id. Not only is this the stuff of which antitrust cases are made, but this is the stuff of which the antitrust case before this Court is made.

SER has alleged current injury to the marketplace by depriving customers of a choice of product, i.e., an environmentally proactive product as opposed to a potentially dangerous (e.g., nuclear based) product. Moreover, SER has been deprived of the opportunity to sell its excess energy to other purchasers. Significantly, moreover, SER has alleged that the energy market is on the eve of deregulation, and that SER is poised to enter that market aggressively and to compete aggressively with PP&L on all fronts.[1] PP&L's

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[1] PP&L, in its recent circular to ratepayers, a copy of which is attached hereto, has including a public relations announcement entitled "Positioning PP&L for Competition," in which it admits that "competition in the electric utility industry is clearly on the horizon" and that it is

anticompetitive conduct, if successful, will prevent SER from entering that market. Clearly, therefore, if PP&L is successful in its current efforts to economically disadvantage SER and to prevent it from positioning itself to compete in the impending environment of deregulation, it will have eliminated a competitor from the marketplace in direct violation of the antitrust laws. As *Multiflex* makes clear, SER need not show actual current harm to competition, but need only show that PP&L's conduct could well have hindered the growth of SER's market share, along with some economic harm to itself as the result of that conduct.

The Third Circuit has emphasized that the issue of "antitrust injury" is an issue for the trier of fact and should not be resolved on a motion to dismiss. In *Brader v. Allegheny General Hospital,* 64 F.3d 869 (3d Cir. 1995), the Third Circuit reversed a trial court decision to dismiss an antitrust suit on the basis that the plaintiff had not adequately pled antitrust injury. The court held that "the existence of an 'antitrust injury' is not typically resolved through motions to dismiss," that "the antitrust injury issue is one that is typically reserved for summary judgment," and that any "impatience" with the federal notice pleading standards has been foreclosed by the United States Supreme Court. *Id.* at 876.

In light of the myriad fact issues bearing upon the sufficiency of the Complaint and the inherent strength of the Sherman Act claims, particularly in light of the fact that SER need not prove actual harm to competition, dismissal at

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already "doing what needs to be done to prepare for increased competition in the electricity business." PP&L specifically states that it is finding ways "to increase [its] business from both the regulated and unregulated sides of our operation" and that "these and other initiatives . . . will result in competitive electricity prices . . . ."

this state is unwarranted. The stay should be lifted and discovery allowed to proceed.

Respectfully submitted,
CAPLAN & LUBER

By: /s/ Mary Huwaldt
Mary Huwaldt, Esquire

MH/xx
cc: Glen R. Stuart, Esquire (via fax)
Daniel Dex (via fax)

[ad logo—CONNECT; PP&L]

'Home Improvement's' Al Gets Comfortable with PP&L's Comfort Home

Is that really Richard Karn, the likable handyman Al Borland on television's "Home Improvement," promoting PP&L's Comfort Home program? I think so.

Comfort Home is PP&L's program for energy-efficient new home construction. PP&L's Comfort Home program contributes to a cleaner environment by reducing the energy use of new homes. A Comfort Home is designed, built and inspected to ensure its energy efficiency. Comfort Homes use energy-efficient electric heating and cooling systems, water heaters and appliances. A Comfort Home has two guarantees. You get a 1-year guarantee on overall comfort. And a 3-year guarantee on heating and cooling use.

PP&L's Comfort Home program was honored by the National Awards Council for Environmental Sustainability, the Governor's Energy Council and the National Association of Homebuilders.

For more information and a list of Comfort Home builders, call 1-800-828-8851.

Building a New Home?

To give yourself and PP&L plenty of lead time to plan for electric service to a new home, start the application process well in advance of the date you actually need service. Simply call 1-800-DIAL-PPL or 1-800-828-8851 to arrange for service to a new address. We will take care of all the details for you.

Positioning PP&L for Competition

Competition in the electric utility industry is clearly on the horizon. At PP&L, we support the premise that consumers

will be better served in an atmosphere where they have a choice of who provides the electricity they buy.

PP&L believes increased competition is healthy and will provide benefits to everyone involved. We're taking a leadership position in Pennsylvania working with legislators, regulators and customers to assure a successful transition to a more competitive environment. We're also participating in these efforts at the federal level.

We believe four basic principles should drive this transition: all customers should be able to choose their electricity supplier; electric service must continue to be reliable; social programs must continue to be funded; and utilities must be able to recover transition costs that may not be recoverable under competition.

At PP&L, we already are doing what needs to be done to prepare for increased competition in the electricity business. We are finding ways to lower costs, to improve our productivity and to increase our business from both the regulated and unregulated sides of our operation. These and other initiatives that we are undertaking will result in competitive electricity prices and a continuation of the high quality service that you have come to expect from PP&L.

PP&L *Working Toward a Brighter Tomorrow*